LEGISLATIVE HEARING ON A DISCUSSION DRAFT TO AMEND CHAPTER 43, TITLE 38, U.S.C.—VETERANS REEMPLOYMENT RIGHTS

HEARING

BEFORE THE

SUBCOMMITTEE ON
EDUCATION, TRAINING AND EMPLOYMENT

OF THE

COMMITTEE ON VETERANS' AFFAIRS
HOUSE OF REPRESENTATIVES

ONE HUNDRED ~~FIRST~~ SECOND CONGRESS

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LEGISLATIVE HEARING ON A DISCUSSION DRAFT TO AMEND CHAPTER 43, TITLE 38, U.S.C.—VETERANS REEMPLOYMENT RIGHTS

THURSDAY, MARCH 7, 1991

U.S. HOUSE OF REPRESENTATIVES,
SUBCOMMITTEE ON EDUCATION, TRAINING AND EMPLOYMENT,
COMMITTEE ON VETERANS' AFFAIRS,
Washington, DC.

The subcommittee met, pursuant to notice, at 9:30 am., in room 334, Cannon House Office Building, Hon. Tom Penny (chairman of the subcommittee) presiding.

Present: Representatives Penny, Patterson, Smith and Santorum.

OPENING STATEMENT OF CHAIRMAN PENNY

Mr. PENNY. The subcommittee will come to order. I want to welcome all who are here this morning.

The Subcommittee on Education, Training and Employment is meeting to review the Veterans Reemployment Rights provisions contained in Chapter 43, title 38, United States Code. Since 1940, protection has been extended to the citizen soldier who leaves employment to serve in our Nation's armed forces by preserving the former servicemember's right to return to his or her preservice employment. Subsequent to the enactment of legislation pertaining to veterans of Active duty service, employment protection was established for members of the selected Reserve.

Since the establishment of the All-Volunteer Force and the development of the Total Force Policy, there has been increasing emphasis on the selected Reserve as a cost-effective means of providing a significant portion of our Nation's defense. Certainly the importance of the selected Reserve was clearly demonstrated with the recent mobilization of over 200,000 members of the National Guard and Reserve during Operation Desert Shield and Desert Storm.

Because it is critical to our national defense that all components of the Reserve stay fully manned by high-quality personnel, this committee recognizes the necessity to minimize any employer related difficulties experienced by members of the selected Reserve. Accordingly, we have developed and distributed a draft bill which would simplify Chapter 43.

I want to stress that the draft bill is primarily a vehicle for us to begin the dialogue concerning reemployment rights. We are not wedded to this draft, although many of its provisions have merit

and deserve our serious consideration. Nonetheless, its primary purpose is to provide us with a starting point for our discussions.

Our goals are to rewrite the provisions of Chapter 43 so as to ensure that, first, they are clear and unambiguous, that employers and servicemembers can easily comply with the law; secondly, that they protect the employment and reemployment rights of selected reservists and Active duty servicemembers; thirdly, that they support our national defense needs; and finally, that they minimize disruptions to employers.

I plan to adjourn the meeting in an hour-and-a-half. Accordingly, I ask our witnesses to limit their statements to no more than 5 minutes. Your entire written testimony will be included in the hearing record. My preference would be that you make remarks separate from those written remarks by way of summarizing the points you want to raise. I would additionally ask unanimous consent that written questions may be submitted to witnesses following the hearing.

With that, I would call on our ranking minority member, Hon. Chris Smith of New Jersey, for any opening remarks he might have.

OPENING STATEMENT OF CHRISTOPHER H. SMITH

Mr. CHRISTOPHER SMITH. Thank you very much, Mr. Chairman. I appreciate your arranging this hearing today to give us the opportunity to review draft legislation on Veterans Reemployment Rights. This is obviously a very timely hearing, considering the number of veterans who will soon be returning to civilian jobs following their obligations in Operation Desert Storm.

Mr. Chairman, approximately 15 percent of the forces participating in Operation Desert Storm are members of the Ready Reserve. We have relied on these individuals to serve in the Gulf or to replace military personnel sent to the Gulf. Both assignments have been absolutely crucial in carrying out our country's mission in Operation Desert Storm. This experience has demonstrated that selected reservists are essential and an integral component of our Nation's military.

Mr. Chairman, the overwhelming majority of Guard and reservists left civilian jobs in order to fulfill their duties in Operation Desert Storm. It is likely that their reliance on the Reserves will not be unique and that this most recent military effort proves the importance of the total force concept. In the future time, it is probable that we will again need our Nation's military reserves to help defend the United States and world interests.

It it therefore mandatory, Mr. Chairman, that we ensure that the Reserve component remains an appealing choice, capable of attracting well-qualified and dedicated individuals. A big part of accomplishing this is ensuring that reservists are afforded certain protections and benefits. Today's hearing focuses on one of the most important needs of a military reservist—the right to resecure one's job upon return from a military obligation.

Mr. Chairman, this is a very timely hearing. We will look at that draft legislation, as you have indicated in your opening remarks.

We look forward to working quickly on this committee in marking up legislation as need dictates.

I thank you for yielding to me and I yield back the balance of my time.

Mr. PENNY. Thank you, Chris.

Before we proceed with our first panel, I do want to acknowledge that the administration has developed their own revision of the Veterans Reemployment Rights law. I talked with Secretary Martin last evening following the President's address to Congress. She indicated that the proposal had been completed some weeks ago and that it was being held at the White House to coordinate this legislative effort with other legislative proposals pertaining to the Gulf operation. Given the fact that we had scheduled this hearing, at the last minute they were able to persuade the White House to allow them to proceed with the veterans reemployment legislation ahead of the others. Consequently, we haven't had a lot of time to look over this proposal, since it was released to us just within the last few hours. But we are pleased that this progress has been made on the part of the administration, and I understand that some of the testimony this morning by administration witnesses may pertain to the provisions of the bill that they are suggesting.

I would also request that yet today, if possible, staff members from the Department of Labor and other Executive agencies hang around and sit down with our staff to compare and contrast the proposals so that we can make some progress in that regard.

With that, I would call forward our first panel, including Hon. Stephen M. Duncan, Assistant Secretary of Defense for Reserve Affairs. He will be accompanied by Frank Rush, Acting Assistant Secretary of Defense for Manpower and Personnel. I call forward as well Hon. Thomas E. Collins, III, Assistant Secretary of Labor for Veterans Employment and Training. He will be accompanied by John Depenbrock, Associate Solicitor for Labor-Management Laws, Department of Labor. And I call forward as well Mr. Stuart Schiffer, Deputy Assistant Attorney General for the Civil Division, Department of Justice, and Hon. Bill Phillips, Deputy Director of the Office of Personnel Management.

I appreciate each of you making yourselves available to this morning's hearing. We will begin in the order you were called forward. Mr. Duncan.

STATEMENT OF STEPHEN M. DUNCAN, ASSISTANT SECRETARY OF DEFENSE FOR RESERVE AFFAIRS; ACCOMPANIED BY FRANK RUSH, ACTING ASSISTANT SECRETARY OF DEFENSE, MANPOWER AND PERSONNEL, U.S. DEPARTMENT OF DEFENSE

Mr. DUNCAN. Thank you, Mr. Chairman.

On behalf of the Department of Defense, I welcome the opportunity to speak to the issue before the committee, and especially the specific act which the administration is proposing.

I might note, parenthetically, that I subscribe to all of the comments that I heard from the Chair and from Mr. Smith about the importance of the legislation and the timeliness of the hearing. Only last night, in his address to the Congress and the American

people as I'm sure the Chair noted, one of the President's final comments was that the victory in the Persian Gulf "belongs—to the regulars, to the reserves, to the National Guard. This victory belongs to the finest fighting force this Nation has ever known in its history." There could simply be no more eloquent statement of the validity of our Total Force Policy than those words.

Of course, just to make sure there is no misunderstanding of what that policy is, permit me to note that the policy requires us to take the capabilities of our Active forces and the Reserve forces and combine and integrate them into the most effective military capability our Nation can afford, at the least cost to the American taxpayer.

So far in the Persian Gulf we have had—and these are the latest numbers I received this morning—227,000 National Guardsmen and reservists who have been called to Active duty in connection with Desert Shield and Desert Storm. That includes over 100,000 who are actually serving in the theater of operations. In fact, 105,303 are actually serving or have served in the theater of operations.

As they return to their civilian workplaces, these Guardsmen and reservists simply must be able to rely on the employment protection that we're here to discuss this morning. Under the Total Force Policy, our Nation simply has to rely upon the National Guardsmen and reservists that constitute over 43 percent of the force. Those National Guardsmen and reservists absolutely must be able to rely on the employment protections that we're here to discuss this morning.

The current statute has been very helpful, and I'll be the first to say that. But, for the reasons I discussed in my own statement, my prepared statement, the reemployment rights of reservists, in my opinion, need to be modernized and clarified. There has to be certainty in the law for those reservists, and recent experience suggests that some ambiguities still remain.

I had the honor several years ago, Mr. Chairman, of serving as an Assistant U.S. Attorney myself, representing the Government in court on many occasions. I will tell you that it is quite challenging to represent the Government when there are ambiguities in legislation, and given the stakes we are talking about this morning, we are most anxious to not just modernize, but to clarify what the law requires.

We know that one of the most important—and perhaps the most important—factor that affects the decision of National Guardsmen and reservists when they are deciding whether to remain in the Total Force or not, is their own perception of how their employer will react to that decision and what types of protections they will have for their civilian employment after they return to the workplace.

Just yesterday I had the honor of being in New Hampshire with the Governor, the Speaker of the House, and the President of the Senate there, to honor employers in New Hampshire who have gone far beyond what the law requires, at a time when unemployment in that State has exceeded 7 percent.

I am not here this morning because the current statute has failed or because there is a uniformly bad experience with Ameri-

can employers. To the contrary, my own personal experience has been that employers want to do what's right. But, we think this proposed legislation will serve as an important reference point to the cooperation that we're constantly seeking to foster, on the theory that cooperation is far better than enforcement mechanisms but enforcement mechanisms are necessary.

In summary, Mr. Chairman, I urge your favorable consideration of the legislation the Administration has submitted, and I look forward to working with the Congress as we discuss it.

Thank you, Mr. Chairman.

[The prepared statement of Mr. Duncan appears at p. 34.]

Mr. PENNY. Thank you.

Mr. Collins.

STATEMENT OF THOMAS E. COLLINS, ASSISTANT SECRETARY FOR VETERANS' EMPLOYMENT AND TRAINING, U.S. DEPARTMENT OF LABOR; ACCOMPANIED BY JOHN DEPENBROCK, ASSOCIATE SOLICITOR FOR LABOR-MANAGEMENT LAWS

Mr. COLLINS. Thank you, Mr. Chairman, for the opportunity to appear today. I certainly share your subcommittee's interest in safeguarding the Veterans Reemployment Rights program.

As you said earlier, with 11th hour discussions and an appreciation for you scheduling this hearing today, we were able to have the administration's bill released and presented to the Congress today. It has been a long project that we've worked on in the Department of Labor, in cooperation with the other departments of the administration, and we appreciate the opportunity to, even at the 11th hour, present our proposal.

The review and modification of benefits and protections available to veterans, reservists and National Guard members, including those in the Persian Gulf, should be done in a coordinated manner. The administration welcomes the opportunity to participate in a process that reviews veterans' proposals comprehensively.

The citizen soldier is an American tradition. Throughout our history, Americans have left their civilian posts to defend the Nation and the principles of liberty and justice we cherish.

The conflict in the Middle East has been no exception. Thousands of men and women serving in the National Guard and military Reserve units were called to Active duty to respond to an act of aggression that challenged and threatened all who value freedom and rule of law. We hope they, along with our regular Active duty forces, soon will be coming home, returning to the families and jobs that they left to serve our Nation in support of Operation Desert Storm.

Under title 38 of the United States Code, Chapter 43, returning veterans, including reserve component members, have a right to return to the jobs they left to serve on Active duty as if they never left. Since 1940, the Veterans Reemployment Rights, the VRR, law has protected employees who have left civilian positions for voluntary or involuntary military service. Upon completion of their Active duty, they are entitled to return to their civilian jobs with the precise seniority, status and rate of pay they would have obtained if they had remained continuously employed. Amendments

to the law gave Reserve and National Guard members the right to leaves of absence from their civilian jobs to participate in military training, and protected them from related discharge or discrimination by their employers because of their military obligation.

The philosophy behind the Veterans Reemployment Rights law is simple and straightforward: those who serve the Nation have earned the right to return to their civilian jobs without penalty or delay. Even before this latest military action required activating large numbers of Reserve and National Guard members, it had become evident that the VRR law has become a confusing and cumbersome patchwork of statutory amendments and judicial constructions, including 15 Supreme Court decisions and many circuit court decisions. This has caused confusion and hampered the Department of Labor's ability to resolve quickly the claims filed by returning servicemembers and provide complete and useful information concerning rights and obligations to servicemembers and employers.

Because of these concerns, the administration is proposing a comprehensive revision of the VRR statute to clearly secure reemployment rights for all those who are eligible, including the Reserve component members who were activated to support Operation Desert Storm. This proposal contains clear statutory language and is not dependent upon multiple judicial interpretations. In addition, we believe the new law will provide quicker and more timely resolution of differences, and it may reduce the case load and litigation.

Mr. Chairman, I am pleased with your interest in upgrading the VRR statute, as evidenced in your discussion draft. I am particularly pleased to share with you some highlights of the administration's proposal, which is called the Uniformed Services Employment Rights Act, or USERA. The USERA continues the rights and benefits under the current law, and it would revise the VRR law, however, to make it more comprehensive and at the same time make it clearer with respect to the application of component Reserve members.

The administration's proposal would help close those gaps in health insurance coverage; continue to provide similar protections for Federal employees and non-Federal employees; eliminate distinctions between categories of military training; it would make the law more understandable; it would outlaw employer reprisals for claimants; and it would assist recruitment and retention of reservists and members of the National Guard to support the Total Force Policy through better job protection.

We believe these improvements to the VRR law, while retaining and continuing the basic focus and rights in the current law, provide the best means to protect those returning to civilian life.

I am abbreviating the prepared statement, which is submitted for the record, to allow time for discussion.

I wish to thank you again for this opportunity to discuss the proposed changes in the Veterans Reemployment Rights Act. I look forward to working with you in accomplishing these objectives that the administration has outlined. I certainly agree that our staffs should meet and work out any technical details.

I am accompanied today by John Depenbrock, Associate Solicitor of Labor for Labor-Management Laws. We would be pleased to answer any questions later.

[The prepared statement of Mr. Collins appears at p. 39.]

Mr. PENNY. Thank you very much.

Mr. Schiffer.

STATEMENT OF STUART E. SCHIFFER, DEPUTY ASSISTANT ATTORNEY GENERAL, CIVIL DIVISION, DEPARTMENT OF JUSTICE

Mr. SCHIFFER. Thank you, Mr. Chairman. Good morning.

I join my colleagues in thanking the committee for its interest in safeguarding veterans' reemployment rights. I also want to assure the subcommittee of the Justice Department's continued commitment to the fulfillment of our responsibilities in this area.

With the subcommittee's permission, I will provide for the record a copy of a memorandum which we sent to our United States Attorneys earlier this year reminding them of the importance of their duty to represent in court veterans whose reemployment rights have been violated.

[The memorandum appears at p. 53.]

Mr. SCHIFFER. Efforts to modernize and clarify existing laws shouldn't be controversial, Mr. Chairman, since there can be little or no quarrel with the proposition that those who answer the call to their country's colors are, at minimum, entitled to have their job security in civilian life assured and protected. It detracts not at all from the importance of the legislative proposals that the committee is considering if I emphasize that their main purpose is not to impose sweeping new obligations upon employers, or even to create fundamentally new rights for servicemembers. Rather, our principal purpose is to provide a more cohesive statute to remove ambiguities and uncertainties which have led to delays in the granting of existing rights, to unnecessary litigation, and in some instances, to what we believe to have been incorrect results. Veterans and reservists should not have to await the outcome of litigation to secure their civilian jobs and their rightful places on the seniority escalator with their civilian employers.

Equally I think it's clear that employers shouldn't have to litigate to resolve their own uncertainty. I think I can safely say, therefore, that these proposals serve the interests of reservists, veterans, and their employers.

We, too, look forward to working with the committee and its staff on this effort. I hope we can proceed very promptly. Again, I pledge that the Justice Department will continue our commitment to provide effective representation in those cases where the law is violated.

Thank you.

[The prepared statement of Mr. Schiffer appears at p. 45.]

Mr. PENNY. Thank you.

Mr. Phillips.

STATEMENT OF HON. BILL R. PHILLIPS, DEPUTY DIRECTOR, OFFICE OF PERSONNEL MANAGEMENT

Mr. PHILLIPS. Thank you, Mr. Chairman, for this opportunity to be here this morning. I will summarize my written statement.

The Office of Personnel Management is strongly supportive of the VRR and, in fact, we have taken steps in the last 3 years to go further than what is required. In order to better assist Federal agencies with their obligation to employees returning from military duty, over the past 3 years we have extensively revised guidance in this area. We began with a complete revision of our regulations, which took effect in 1988. They are now clearer and have alleviated much confusion that may have existed.

We also have completely updated the Federal Personnel Manual in the area of restoration to duty, and further revised it last year.

Finally, we have issued increased information to employees so that they better understand what their rights are as reservists and as veterans.

In response to the massive deployment of reservists to the Persian Gulf in August of 1990, and the sudden disruption in the lives of many Federal employees and their families, OPM has further increased our commitment to ensuring that the Federal Government functions as a model employer with respect to veterans reemployment rights and protections.

This commitment goes beyond the usual requirements of the law in several respects. Following the President's decision on August 22, 1990 to call certain members of the armed forces reserve to Active duty, OPM issued a government-wide memorandum to remind agencies of their VRR obligations and urged them to make certain that affected employees leave their employment with full knowledge of reemployment protections.

OPM further urged agencies, in view of the uncertain duration of the operation, to retain absent reservists in their positions on agency rolls in order to guarantee their return to the same position that they left, and also preserve group insurance eligibility for up to the full year permitted by the current law. Also, we have made counseling through agency employment assistance programs available to family members of activated reservists.

In late August, when we faced budget sequestration concerns in many of the agencies, which forced the planning for possible employee furloughs, OPM encouraged agencies to make exceptions from furloughs for any civilian employee called to active military duty during Desert Storm and Desert Shield in order that those individuals would be assured of returning to their former positions and would be able to use any paid leave to which they were entitled.

Then, on September 25, 1990, OPM issued interim regulations that waive the employee share of Federal employers health benefits premiums for employees while they were on military duty commencing on or after August 22, 1990.

Given the large number of Federal employees who have been called to Active duty in the current Persian Gulf emergency, and the fact that many hold key positions in their agencies, our efforts to assure maximum protection of their employment rights and ben-

efits have required considerable creative problem solving on the part of the agencies in continuing their responsibilities. However, we believe that our citizen soldiers who have served to preserve freedom in the Persian Gulf deserve no less.

Thank you, Mr. Chairman.

[The prepared statement of Mr. Phillips appears at p. 55.]

Mr. PENNY. Thank you. I appreciate your participation in this morning's hearing.

If I might address first my questions to Mr. Duncan, in your testimony you made reference to the health coverage and other benefit provisions of the administration's draft.

Mr. DUNCAN. Are you referring perhaps to the comments about the Soldiers and Sailors Civil Relief Act?

Mr. PENNY. I don't have a page number, but as I read it here, it says, "The final feature of the proposed legislation which I want to note here is its treatment of health and pension benefits."

Would you do me the favor of elaborating a little more on the provisions of the administration's draft bill?

Mr. DUNCAN. This is on the next-to-the-last page you're talking about, Mr. Chairman?

Mr. PENNY. Yes. Just talk a little more, if you would, for our benefit, about the changes that you're recommending from the current statute as it pertains to these benefit programs.

Mr. DUNCAN. Well, conceptually—and let me talk in broad, conceptual terms. Let me express my appreciation for being permitted to go first. As the Chair knows, I have an appointment that I simply have to be out of town for. Mr. Rush, who is my Acting Deputy for Manpower and Personnel, will be here to discuss it in detail.

When a reservist goes on Active duty, not just for Desert Storm but for even a short tour of Active duty—but Desert Storm is the most recent and obvious example where there are longer tours of duty involved—we don't want the families to be put at risk merely because the employer is in a situation where they might not wish to continue health care benefits. So, philosophically, we don't want reservists to necessarily benefit by service in the Reserve components, but we certainly do not want them to suffer by virtue of that service.

That's the same philosophy we have applied to the recommendations we made last year on the Soldiers and Sailors Civil Relief Act, the professional liability protection, and so forth. We want to eliminate all obstacles to Reserve service. The philosophy is simply to give them broad protection so they don't have to worry about the continuation of health care benefits while they are serving.

Mr. PENNY. So in terms of those called to Active duty in the Gulf, when they were called up for what was likely to be a period of months, the understanding is that they enroll under CHAMPUS and, upon their discharge, they re-enroll in a private sector plan.

What are you dealing with here; shorter terms of call up and a requirement that the employer continue coverage for those shorter time frames?

Mr. DUNCAN. That's correct, sir. Of course, when they're called to Active duty for Desert Storm, the moment they are called to Active duty they are no longer technically reservists. They are now

members of the Active forces and their families are entitled to medical benefits and all of the benefits that would apply to full-time Active duty personnel.

One of the problems I face is making sure they understand that, but I think we were fairly successful in accomplishing that task. This would be for something other than long employments, because it's clear that, if we can get the word out, they know they are entitled to the same benefits as Active duty people for long employments.

Mr. PENNY. Thank you.

Mr. Phillips, in testimony presented by Mr. Duncan and by yourself, I saw the same reference to the Federal Government serving as a model employer. I know we don't have much experience with this, but if there are likely to be any problems with accessing a previous position, what are the instances that would be at play here? What are the problems within an agency or department that may make it difficult for someone to get the same job at the same pay?

Mr. PHILLIPS. Currently, the law provides that they have reemployment rights to their job or a similar job. Late last year, when this military action first started up, we did encourage, with the backing of the President, that the veterans return to the jobs that they held, which is a step further than required.

One of the problems that might come up is, in their absence while on Active duty, there is a change to the structure of an organization and the job no longer exists; then they certainly have the right then for a comparable position. I don't know of any instance where we think there will be any problem with this on the current situation and we certainly would do everything to alleviate any problems. The employee then has a right, if there is any misunderstanding, to go to the Merit System Protection Board for appeal. The good news on that is, when that has happened in the past, it has usually been miscommunications rather than malice. So I think the Federal Government has been and will continue to be a model employer in this area.

Mr. PENNY. Mr. Schiffer, in your testimony you made reference to a couple of provisions in our draft, not the administration's draft, that raise concerns about jurisdiction, as to who would represent these aggrieved employees. But I didn't really see in your testimony reference to any other major differences between the administration's draft and the committee's draft.

Are the basic differences, in your judgment, in those areas of jurisdiction for representing the employees and the penalty provisions? Are those primarily the main differences you see between the two drafts?

Mr. SCHIFFER. I think the bills are quite, quite close to each other. Indeed, when you talked about staff sitting down and working together, this should be one of the easier jobs of melding a draft proposal into a final product.

Mr. PENNY. In the short time I have had to review the administration's proposal—and I do appreciate having it, even though it came in at the last hour. I do appreciate the fact that it wasn't the fault of anyone here at the table that we got it on such short

notice. But I didn't see significant differences. I was pleased to note that we seem to be on the same wave length.

Mr. SCHIFFER. I think our litigating authority is something that's important to the administration, but that's a continuation of existing practice. The civil penalty provision, frankly, I have difficulty arguing against civil penalties. I have been in the enforcement business for so many years, and we frequently come to Congress asking for civil penalties. In all candor, it's a judgment call. In many areas, civil penalties can be an effective deterrent and an effective sanction. On balance, I think we have concluded that that's not really needed here and that it could lead to more litigation. But I don't purport to have ultimate wisdom on that.

Mr. PENNY. That was a consensus agreement among the participants in developing your bill, I take it. Did civil penalties come up in the discussion stages, in the development of the administration's bill?

Mr. SCHIFFER. I at least focused on it when I saw the draft provision. We had some discussion. I mean, our——

Mr. PENNY. To your knowledge, it was not something that was considered in developing the administration's proposal?

Mr. SCHIFFER. I think there was some talk of it. I wasn't personally involved in those discussions, so I don't want to purport to be an expert on what was discussed.

Mr. DUNCAN. We didn't explicityly focus on penalty provision in Defense, Mr. Chairman. I understand there's a recent proposal from a member of the full committee. But I don't think that was discussed at great length within the Department of Defense, so I'm not here to represent the Defense Department on that. I don't know what our position would be on that.

Mr. DEPENBROCK. And that's the same for the Department of Labor, too. We never really discuss civil penalties, particularly in discrimination type statutes. For instance, in the National Labor Relations Act, we don't have civil penalties in that Act. It's a remedial statute as opposed to——

Mr. PENNY. So there is comparability in the way this ought to be handled?

Mr. DEPENBROCK. Exactly.

Mr. PENNY. Lastly, Mr. Schiffer, in your testimony you indicated that expeditious passage of these revisions might be helpful for those returning from the Gulf. Is it possible for us to make the provisions of this new law applicable to the returning servicemen, or are we going to be held to the ambiguous statutes that were in effect upon their call up?

Mr. SCHIFFER. The statute has an effective date that would make it applicable to those returning from the Gulf. I think it's first important for Congress to be explicit in the language——

Mr. PENNY. That we intend for this to be——

Mr. SCHIFFER. There are a few transitional provisions that you have already alluded to that are somewhat new. But with the exception of those—As I indicated in my informal remarks at the beginning of the hearing, the statute does not work new substantive obligations. Employers were on notice before the statute was passed that they have an obligation to reemploy those who return.

So I don't see major problems in Congress making clear they mean it to apply to those servicemembers.

Mr. PENNY. Thank you.

Mr. Smith.

Mr. CHRISTOPHER SMITH. Thank you, Mr. Chairman. I want to thank our panel for the excellent testimony.

I want to thank the administration, which you gentlemen represent, for being so ready with a product for the Congress to consider in this timely fashion. I think it suggests the same kind of competence and the same type of very professional analysis and sensitivity that went into Desert Storm itself, that you're ready with something which hopefully will truly fit the needs of our returning servicemen. So I want to thank you for this product.

I have only had a short period of time, like the Chairman, to look at it, because we just received it. But I think it is a major contribution to providing for our returning veterans who are in need of obtaining their jobs again.

In looking at what I have seen so far, it seems to me that one of the major deficiencies of our current law is enforcement, if I'm reading it correctly. The new bill calls for a considerable focus on enforcement.

I was wondering, Mr. Schiffer, if control of veterans reemployment rights litigation is retained by the Department of Justice, what resources can be earmarked and focused upon that, and has there been any kind of analysis at all as to what kind of caseload we can anticipate?

Mr. SCHIFFER. It's difficult to predict numbers of cases. As I suggested, enforcement has always been a high priority. I think the problem has not been an attitude towards enforcement as much as it has been the fact that occasionally litigation results from ambiguities. But I don't have any exact numbers. My colleagues from Labor can tell you.

But I have heard, for example, that referrals to the Labor Department for investigation can run a thousand a year. We have typically received—and obviously I'm talking prior to Desert Storm—we have typically received on the order of 40 to 50 referrals in a year. So the great number of cases has been effectively resolved by Labor at the investigative stage. We have litigated cases where we have to, and I mentioned, for example, the King case in my testimony, where when conflicts develop in the law or uncertainties appear, the Solicitor General has been fully willing to ask the Supreme Court to resolve these.

I should note anecdotally that while I don't purport to be an expert on how the Supreme Court determines to take cases, I think the importance which the Judiciary subscribes to the statute is illustrated by the fact that the Supreme Court regularly uses its discretion to review cases where conflicts have existed.

We will continue to use the United States Attorneys throughout the country. I mentioned the memorandum that I have supplied for the record, where we have only recently reminded them of the importance of bringing these cases. And should resource problems develop in the United States Attorneys Office, we have experts here in Washington who will personally attend to these cases and will

do so with the assistance of our colleagues at the Labor Department.

Mr. CHRISTOPHER SMITH. One of the additions in the new bill, in a very quick read that we've been able to have, is that it protects against reprisals against those employees who are readmitted but who apparently might suffer some reprisals at some point.

What is anticipated along those lines? What kind of civil penalties, for instance, might be visited upon an employer who takes out on his or her employee some kind of reprisal at some later date? How is that going to work out?

Mr. SCHIFFER. The idea again is to protect the job. It is to protect the job so that the employer does not take the employee back on day one and fire the employee on day two. This will be treated much the same as——

Mr. CHRISTOPHER SMITH. How long does the protection last?

Mr. SCHIFFER. I'll let me colleagues correct me, but I think it's a year. It depends on length of service, I believe.

Mr. COLLINS. It's one year for the current reservist in Desert Storm. For shorter periods of Active duty for training, it could be 6 months, or for very temporary duty, it could be for 3 months, where reprisals are prohibited.

Mr. CHRISTOPHER SMITH. What kind of investigation is triggered if the veteran feels that he or she is being discriminated against because of bringing a case, for example, against an employer?

Mr. SCHIFFER. Well, it would start with my colleagues in the Labor Department, so I will let them address that.

Mr. COLLINS. You mentioned a classic example where an employer would take back a reservist and immediately, or within the 1 year or 6 months or 3 months, which I just described, and then discriminate to the extent that the employee would bring forth a complaint. That, of course, would be investigated by the Department of Labor. If merited, we would simply have the employee reinstated—that's the primary penalty—with lost wages and other matters which may have accrued due to this discrimination.

Mr. DUNCAN. Mr. Smith, I might add parenthetically one note. From our standpoint at Defense, we hope that we never have to get to enforcement mechanisms. That's why we have an agency in my office, the National Committee for Employers Support of the Guard and Reserve. We have 3,700 volunteers in all 54 States and territories who are typically employers themselves but who are there to try to inform and broaden education and, eliminate disputes before they arise to the enforcement stage. We think it is far better to foster a good understanding between the employee reservist and the employer, than to litigate in court. So we are looking to resolve disputes. But if we don't succeed, then we refer the case over to the Labor Department.

Mr. CHRISTOPHER SMITH. We are all grateful that the casualties were so low in this particular conflict, but for a returning man or woman who has been handicapped as a result of the call up, how would the new law apply in terms of ensuring reinstatement in a similar or equal job, and how far does the small business employer have to go in accommodating such a wounded or handicapped person?

Mr. DEPENBROCK. I can answer that. There is a provision in the new statute for what we call reasonable accommodation. That will have to be worked through, you know, with the employer and the returning veteran/reservist employee.

I think as we develop the legislative history here, I think that is one of the ways, with your speaking to this issue as well, to the legislative history, I think that will be very helpful. But it is basically just a reasonable accommodation to ensure that the employee, as a result of their disability, is returned to a comparable job that he or she can handle.

Mr. CHRISTOPHER SMITH. Is there any additional safety net contemplated for that person? Say a reasonable effort has been made and reemployment is deemed not possible; what happens to that employee?

Mr. DEPENBROCK. Then the person could come and file a complaint with the Department of Labor. I mean, we obviously try to settle 99.9 percent of these cases, as Mr. Duncan noted, and work it out through the employer. But the safety net is that if there's a violation and not a reasonable accommodation, then they can file a complaint and there will be an investigation.

Mr. CHRISTOPHER SMITH. What I'm suggesting is that the employer does take those extra steps but the end game is there's no job there. Are there other anticipated——

Mr. COLLINS. The safety net, beyond that, would be our ongoing programs to our States, our Disabled Veterans Outreach Program.

Mr. CHRISTOPHER SMITH. That's what I'm getting at.

Mr. COLLINS. A disabled veteran receives priority services and specified services by our DVOPs for additional employment.

Of course, we're on the threshold, of discussing a severely disabled veteran who would, of course, by this time would have received the opportunity for VA voc rehabilitation as well as disabled veteran compensation, another area that we're not really discussing this morning.

Mr. CHRISTOPHER SMITH. I do have several questions, but my time is up, so I will ask two final ones if I could, real quick.

First, what do you feel would be the correct time line for passage—2 weeks, 3 weeks, a month—to get this to the President's desk? And maybe, Secretary Collins, you might want to touch on this, the importance of authorizing DOL's rulemaking and subpoena authority, versus the current law and its deficiencies—why is this so crucial to implementation of the law?

Mr. COLLINS. We are within weeks now, within days—in fact, within hours—of those who served in Desert Storm returning home. So it is important that we do our very best. This legislative initiative is, indeed, important to clear the way for the public information program that we have underway, that we're all involved in, communicating what the basic rights are to our returning veterans and reservists, Guard members, their families and their employers. That's underway and that's imminent. We must be doing that even today. We have plans to do that.

We need to base that communication effort upon a clear law. We discussed in detail the real basic need for this revision that we have proposed as USERA to clarify what has existed and has been amended since 1940. So it is very important that we move with this

modernization that Mr. Duncan mentioned of the reemployment rights.

Of course, we are busy preparing right now the technical assistance to ten regions and an office that I have in each State to provide this assistance as our reservists come home. These staff agents need to know exactly what we're doing in Washington; they need to know exactly what the law is; it needs to be clear to everyone what their rights are and how the law will be administered. That's the purpose of this legislative effort and this hearing today.

Mr. CHRISTOPHER SMITH. The second part was on the rulemaking requirement.

Mr. DEPENBROCK. If I could just follow up and expand on that, the purpose of the rulemaking would be to provide for updated clarifications of the law as we move along. Since we don't have regulatory authority right now, everything has been done on a case-by-case basis or by legislation. With you giving us the rulemaking authority, the Secretary of Labor has the opportunity to go through the notice of proposed rulemaking, get information from the employers and parties out there, and have that flexibility to make the changes where needed.

With regard to the subpoena enforcement authority, obviously that has to do with ensuring that we have an effective enforcement program. Like we say, most of the time we work things out through voluntary cooperation in this program. But for those few instances, if we have the opportunity to get documents or to have witnesses attend and testify as to certain matters, that just gives us an overall, more effective enforcement program, which, you know, most enforcement programs have subpoena authority.

Mr. CHRISTOPHER SMITH. If I could ask one final question, Mr. Chairman?

Is there anything in this legislation, or do you think there is a need for any new legislation, to protect those Guard and reservists who might find themselves, when an employer learns they are a part of the National Guard or reserves, less likely to be hired? In other words, I'm not asking about returning veterans, but about guard or reserve members who may find themselves the brunt of discrimination and unable to procure a job at all because they may be a "liability" to a prospective employer at some point in the future?

Mr. COLLINS. Such actions would be prohibited by our proposal.

Mr. CHRISTOPHER SMITH. It would be prohibited. Thank you very much.

Mr. PENNY. I want to thank this panel for their participation. We look forward to cooperating with all of you in finalizing the legislation for consideration here. It is my intent that we will move rather quickly on this matter, if we can get this done within the next couple of weeks, both here in the subcommittee and in the full committee. I think that would be best for all concerned. I again look forward to your cooperation in that effort.

Thank you for your participation.

Mr. COLLINS. Thank you.

Mr. SCHIFFER. Thank you, Mr. Chairman.

Mr. PENNY. The next panel includes Rear Adm. Philip Smith, USN Retired, Director of Legislation, Naval Reserve Association;

Master Sergeant Michael Cline, Executive Director of the Enlisted Association of the National Guard; Colonel Charles Schreiber, USAF Retired, Director of Legislative Activities, National Guard Association of the United States; and Maj. Gen. Evan L. Hultman, USA Retired, Executive Director, Reserve Officers Association.

We're glad to have you all here. We will start with Rear Adm. Smith.

STATEMENT OF REAR ADM. PHILIP W. SMITH, USNR (RET), DIRECTOR OF LEGISLATION OF THE NAVAL RESERVE ASSOCIATION

Admiral PHILIP SMITH. Thank you, Mr. Chairman. Our prepared statement is very short, but I will summarize and be even more brief, if I may.

We really appreciate the privilege to appear before the committee on behalf of the Naval Reserve Association to present our views on the Veterans Reemployment Rights issues.

In our statement I noted the two draft acts are quite similar in that they both simplify Chapter 43, title 38, U.S. Code, by eliminating the types of military service and substituting time in service as the criteria for the period of job protection and also the time to report for work after military duty. This is intended to promote better understanding and enforcement.

In the prepared statement I have stated that I thought the time for job protection, the graduated time of one year for the extended service, 6 months for lesser service beyond 30 days, and 3 months job protection for the period of service of less than a month was adequate.

On further reflection, and speaking to people in the field, I would like to change that. I think it would be better to change that job protection to one year for all those categories. The problem is the same whether the veteran reports for his 2 weeks of summer camp or longer duty; he needs his job back and he needs the protection. Or if he is on 30 days training duty, he needs the same protection as does the person who is on Active duty for a year or more.

Another very important thing is the subpoena authority that you have addressed with the other panel. To have the subpoena authority for assisting investigations is a very important change, so that you can have the power to enforce discovery. In these instances, the records are normally within the control of the employer, and sometimes it is difficult to get the records, as well as the witnesses. So I think that is a very important investigative tool.

Also, the injunctive and declaratory relief, which I believe was in the draft bill of the committee, I think that prospectively, where the returning serviceman is threatened that if he goes, he will, in fact, be fired when he gets back, I think it's an injustice to require him to go on duty and bet that he can get his job back under the assistance of the act. So I think, where it's warranted, having the injunctive and declaratory relief before the fact is an important feature.

It was touched on by the other panel, but it is my understanding that the task force draft provides for the Department of Labor to do the investigative portion and the mediation, and the enforce-

ment will be with the Attorney General and the district attorneys. The committee draft proposal, as I understand it, provides that the Attorney General may delegate the representation feature back to Labor. In that event, you have both the investigative feature and the representation feature under one agency. I think there is more accountability and it makes more sense from our standpoint to combine it into one agency, the Department of Labor.

To increase the access of the veterans to the remedies under the VRR act, consideration of inclusion of the Civil Rights Attorney Fees Act in VRR cases should be explored. A substantial percentage of the servicemen involved are middle and some perhaps lower income personnel. In the event that the district attorney has a backlog of major drug cases, et cetera, and the Labor Department's investigative service is overloaded, as it might be with the returning veterans, I think to have an opportunity to be represented by a private attorney and enable them to recover the fees if they're successful is something that should be explored.

Thank you for the opportunity to testify. I will try to answer any questions you may have.

[The prepared statement of Admiral Smith appears at p. 59.]

Mr. PENNY. Thank you for your testimony, Admiral Smith.

Master Sergeant Cline, this is a setting in which we don't go by rank. You're next.

STATEMENT OF M. SGT. MICHAEL P. CLINE, OHIO ARMY NATIONAL GUARD; EXECUTIVE DIRECTOR, ENLISTED ASSOCIATION OF THE NATIONAL GUARD OF THE UNITED STATES

Sergeant CLINE. Thank you, Mr. Chairman. Thank you for the opportunity to present to the subcommittee the views of the Enlisted Association of the National Guard of the United States with respect to amendments to title 38, U.S. Code, regarding veterans employment rights.

This particular act is of special interest to me. As the Executive Director of EANGUS, I am here to testify on behalf of all enlisted members of the National Guard, but also for both my wife and myself who are both enlisted members of the National Guard.

We at EANGUS would like to recognize the efforts made by both this committee and the administration to amending title 38, Chapter 43, of the U.S. Code. More than 556,000 members of the National Guard are prepared to serve our Nation. Of this 556,000, 492,000 are enlisted members, and these amendments to title 38, Chapter 43, could not have been more timely.

Specifically, more than 340 units of the Army National Guard are comprised of 56,000 members as enlisted soldiers, with 74 units of the Air National Guard comprised of 4,826 enlisted airmen, are serving in the Gulf. Additionally, thousands of other Guard members are serving in various capacities around the world to alleviate the shortage in manpower so that our Active forces could be committed to the Gulf. Our Association is not only concerned for just those 492,000 enlisted members of the National Guard, but for all the 200,000 reservists that are serving currently in the Gulf.

Some questions that we posed to the subcommittee—and we would like to have some clarification in the bill—is what happens

to Guard members or reservists who return home to find that his or her company has been sold or has been merged with another company? What provisions are going to be provided in the bill? This is a day of mergers and takeovers by companies and we feel there needs to be some protection afforded in the bill for this. The believe that a company owner has the responsibility to inform the new owner of any persons that will require reemployment under this act.

The second thing, what happens to individuals who work for a company under a "personal services" contract? We would like to have the employer reinstate the employee in his or her position, if that contracted position still exists for the remainder of the time that was on that contract.

Third, we would wish for the amendments to further clarify the meaning of the statement "unless such employer's circumstances have so changed as to make reemployment impossible or unreasonable." We feel this statement is too vague and gives the employer a wide range of situations in which he can define his reasons for not reemploying someone that would be affected by this statute. Clarification of this statement would benefit both the employer and employee.

The National Guard and Reserve components of the United States armed forces are a vital part of our Nation's forces. These brave men and women willingly volunteered to serve in the military, understanding fully that they may be called upon to fight for their country, as they have in the Gulf. The people of the United States should feel an obligation to ensure that these servicemen and women are taken care of when they return home from the Gulf.

Mr. Chairman, more than 354 years ago our forefathers laid down their plows and went off to fight for what is now the greatest Nation in the world. When the need for their services were complete, they returned to the land and resumed life as before. Shouldn't our Guard members of today enjoy that same privilege?

Thank you for your time and patience. This concludes my statement.

[The prepared statement of Sergeant Cline appears at p. 66.]

Mr. PENNY. Thank you.

Colonel Schreiber.

STATEMENT OF COL. CHARLES G. SCHREIBER, USAF (RET), DIRECTOR, LEGISLATIVE ACTIVITIES, NATIONAL GUARD ASSOCIATION OF THE UNITED STATES

Colonel SCHREIBER. Mr. Chairman, I also have a very short written statement, which I ask go in the record. Most of our concerns and comments today have already been discussed by some of the previous witnesses, so I will just have a couple of very brief comments that I would like to make.

Basically, I would say the National Guard relies heavily on the support and good will of the employers of our citizen soldier members. We have spoken quite often about the National Guard family, and in that we include the Guard member, his family, his or her employers, the defense industry that provide us with our equip-

ment and, more indirectly, their Representatives in Congress. We recognize that we have a true need for reemployment legislation, but we also believe that one of our greatest assets is the voluntary support of the employer member of our family.

I think we have seen in Desert Storm that we have had overwhelming support by the majority of those employers, and I would hope we would have very little evidence of any problems when our folks come back.

I only have two comments on the bills themselves. The first one would be on the committee version. We have some concern about the addition of civil punitive damages to what up to now has been remedial legislation. We don't have a strong position against it, but we have some concern that that changes the flavor of the legislation.

In relation to the administration bill, we have reviewed a draft of that in the last several days. We don't know that it's the exact final version. But we have a little concern about a provision in that bill which presumes reasonableness for all service, which we think may encourage or could encourage some abuse at some time. We understand that the sectional analysis tries to clarify that, but we do think that needs to be looked at closely, and if the sectional analysis is clear enough, possibly that does not become a problem.

Finally, just as our military forces are currently an all-Volunteer Force, we should encourage the relationship with our employer to be all-volunteer to the maximum extent possible. We believe the committee bill and the administration bill are very similar and certainly are very supportable and generally follow that goal. We would oppose any proposals that changed that direction.

Thank you.

[The prepared statement of Colonel Schreiber appears at p. 71.]

Mr. PENNY. Thank you, Colonel.

General Hultman.

STATEMENT OF MAJ. GEN. EVAN L. HULTMAN, AUS (RET), EXECUTIVE DIRECTOR, RESERVE OFFICERS ASSOCIATION OF THE UNITED STATES

General HULTMAN. Mr. Chairman and members of the committee, I began as a private in the infantry in World War II, so you aren't really out of order at all, Mr. Chairman, in going back to the beginning.

In order that I might put forth really my true observations, because I do agree with what has been said up to this particular point, I think we're in a unique position because I think we are in agreement, with maybe some two or three things we ought to take a harder look at.

I have probably spent more time in my life on the issue that is before us now than maybe any other issue that has ever faced me, and far more time that I really wanted to. Personally, I was one who the law originally impacted upon when I left after three-and-a-half years in World War II, because I had been an employee of John Deere. This particular law applied to me, its strengths and its weaknesses.

As a reserve commander from literally the end of World War II, as a battalion commander, and forward up until 4 years ago, I lived with this problem all through its machinations as a commander at all levels. Professionally, as a private lawyer in my own firm, as a city solicitor, a local district attorney, a state attorney general, and as a United States Attorney representing three different administrations, I have lived with this problem and the challenges. In fact, I had a number of cases in this area, as the Labor Department and some of those who are very instrumental in what is going on now, and I had a personal interest because of all those personal relationships. So as a United States Attorney, I tried a number of those cases and handled the appeals of those cases that are a part of the legislation and a part of the history in terms of lawsuits as the legislation stands now. So I speak from all of those perspectives and as an employer personally of men and women who have faced these responsibilities.

I would just like to make a couple of observations because I think we are in great, great agreement here. One is that when you compare 1940 with 1991, there is one very basic, fundamental difference—and you've got to start there. That is, it wasn't a draft environment, as was the case literally up through every war beginning with World War II. This legislation, in 1940, the accompanying legislation, was a draft, of which we ultimately ended up with approximately 15 million volunteers and draftees. Literally, they were one and the same because your day was going to come and it came almost at the same time, whether you volunteered as a 17 year old or on your 18th birthday some things happened very quickly in terms of that system.

Now we are dealing with an All-Volunteer Force. In order to preserve the great integrity of that force and the fact that it has operated so incredibly beyond not only the expectations but the dreams of all of us who believed in it and have been a part of it, this is fundamental to its future success and livelihood. Because without a job, without being harassed, without having to come back with that kind of a problem, the All-Volunteer Force is up against problems that are of such a magnitude that probably we may be facing a defeat of this incredible concept that has worked so well. So we must approach it with that concept and that difference in mind.

Now, with that in mind, and as one who has been on both sides of this equation, there are two sides to this equation and we must keep it always in mind, the employer and the men and women of the armed services who are our first concern and should be in this legislation. There is a serious problem in an All-Volunteer Force in terms of the employer, and the smaller the employer, the more critical the problem.

Many of these reservists that we're talking about here are certainly, primarily, employees. But there is also a significant number of them in this highly-trained, highly-educated, highly-professional Reserve force that we have now as a key part of the total force who are small employers. It impacts adversely on them.

So I plead with you today to not only do the things you are doing here, but to play your role in all those committees that you're on and as representatives who are going to have a voice and a vote in

all those other measures to make sure we get that total package put together and not just the one we're here on today.

Now, if you will give me just two sentences. One, on the litigation side, I think clearly that subpoena authority, from experience, clearly has got to go to the Department of Labor. Turf protection is not the issue—although some would put it in that category. As the Department of Justice, we ought to keep that authority—and there's a good argument for it.

But as a practical matter, I can tell you, in an office of a United States Attorney, with all of the challenges and cases that are there to compete, priority-wise, this area is not going to be in competition, no matter what. Sure, they're going to give it attention. But we're in the euphoria of the moment, and a year from now and 5 years from now and 10 years from now, let me tell you, this one, priority-wise, compared to drug cases and compared to all the other things, is on such a low priority that there just isn't time. There just isn't time, unless that U.S. Attorney, from his own personal background and experience, et cetera, has a reason to give it priority. So that's very important.

The other thing I would say to you, on the other part of that equation is the legal representation side. But I would caution in looking there at moving too far out in that direction—of making it a primary right. I'll tell you, I have dealt with too many abuses in this area, and there are abuses and there will be abuses. So long as we make sure that the protection is there for the legitimate case, leave the responsibility for that as a category on the individual. If their case really hasn't had the kind of merit that they feel it has, because in my judgment that's going to keep the courts, keep the Department of Justice, and keep the Department of Labor and everybody else on the sound, good, solid cases, but still leaving the ultimate protection there if somebody feels their case has merit and they haven't had the attention.

I would be pleased to answer any questions. Thank you.

[The prepared statement of General Hultman appears at p. 76.]

Mr. PENNY. Thank you, General.

Admiral Smith mentioned that he felt we should have injunctive relief prior to leaving a job for a military call up. Would you like to comment on that and then maybe——

General HULTMAN. I would agree with that, but to be frank about it, I haven't seen, you know, in my experience in the area, that that's a major problem area from a priority standpoint. I think it clearly has merit and I would be in favor of it.

I would also add as a footnote there, if I could tack on the point about the 90 day, 180 day, one year provision. I think that's very bad. I think it ought to be a one year provision, as is indicated here, because those who are in the 90 day category are those who need it the most. Those are the recurring ones that are happening every day with most reservists under our system. To only give them a 90 day protection really puts them in harm's way. So I think that's a change that clearly should take place.

In fact, in my written testimony I wonder if possibly it doesn't imply and give and encourage that small minority of employers who aren't with us—and the grand majority of them are—maybe even a legal basis for them to seek to get rid of reservists. So I

think you have to take a good, hard look at that provision. That is the one single one that does bother me and concern me. Clearly, it ought to go to a year. I'm not so sure that maybe you're even encouraging employers to say "well, after this time is up, I'm going to get rid of this reservist", because all reservists have an adverse impact on every employer, to a degree.

Mr. PENNY. Thank you. I think that's a very good point. We will take that into consideration.

Admiral PHILIP SMITH. Could I address that?

Mr. PENNY. Yes, Admiral.

Admiral PHILIP SMITH. My colleague here has explained it pretty well, but on the injunctive relief and declaratory judgment, I think we need some sort of prospective relief in those unusual circumstances, where there is plenty of time, he's going on duty 6 months from now, he notifies his employer, and the employer says, "If you go on duty, you're fired." So he shouldn't have to wait. If I recall correctly, that was in the committee's draft to provide for injunctive and declaratory relief and I think that is very important.

On the other subject, the one year, although my submitted testimony didn't highlight it, the current statute has one category of service that has one-year protection. The remainder, it just says you shall not discriminate. So if we come through in the new law and we say for certain periods of time it's 3 months protection, or 6 months, we may be highlighting the fact that the protection, in the perception of the employer, has been reduced. So I think that is one thing to consider.

Mr. PENNY. Thank you.

Master Sergeant Cline, in your testimony you raise concerns about the meaning of the language pertaining to an employer's circumstances and your belief that the words "unless such employer's circumstances are so changed as to make reemployment impossible or unreasonable" might not be clear enough. Do you have some suggestions for us as to how we can nail that down, and maybe others on the panel could share with us whether they agree that that language is unclear and could lead to ambiguity for our servicemen.

Sergeant CLINE. Mr. Chairman, I think one thing that needs to be spelled out there is, when we say "unless such employer's circumstances are so changed as to make reemployment impossible", we have to broaden that out and spell out what we consider impossible. Now, we can fully understand that a business has subsided, has fallen into bankruptcy, closed its doors and the job is no longer available. But in the case of the modern day, where we have mergers and takeovers and all that, a lot of times there is a house cleaning, per se, when this happens. We need protection for those people.

We were very fortunate this time around that we were able to end this war in 100 hours. But what would have happened if this would have drug on for a year? How many companies may have gone out of business at this time? So if there is a merger or a takeover and that position is still available, then that Guardsman or reservist should have a priority to come back and be in competition for that.

Mr. PENNY. Colonel.

Colonel SCHREIBER. Yes, sir, Mr. Chairman. I believe that the administration bill covers the point that he just made very well, that the follow-on business owner is responsible for that employment.

On the other side of it, I think that the basic presumption here is that the rehire or reemployment right is there, and it says only in those exceptions where it's impossible, or almost so. Personally, I would think the way it's written would be satisfactory, because it would be on the part of the employer to prove why it's impossible for him to rehire.

Mr. PENNY. So you're satisfied that the burden is on the employer?

Colonel SCHREIBER. Yes, sir.

General HULTMAN. I would add a footnote that you might consider this in terms of your rulemaking issue, that this may be an area that could come in the rulemaking area and authority as you better define what the problem is and as it comes along.

Admiral PHILIP SMITH. From my recollection of the draft of the administration's bill, I think it is adequately covered.

General HULTMAN. Yes.

Admiral PHILIP SMITH. One other point. I concur with Colonel Schreiber, that I have concerns about the punitive aspect of it, the $25,000, from the standpoint that it is very hard to prove why a Guardsman or reservist was not hired, particularly initially. If there is publicity given to the fact that the Veterans Reemployment Rights has a $25,000 punitive provision in there, it is well and good to be able to enforce it and have some teeth in the law. But I am concerned about the effect it might have on particularly the original employment rights of the reservist which may inhibit the opportunity of working.

Mr. PENNY. Thank you.

Mr. Smith.

Mr. CHRISTOPHER SMITH. Thank you, Mr. Chairman.

If I could follow up on the issue of the mandatory fine—of course, while it's mandatory, it is not necessarily a $25,000 fine, although that is the ceiling imposed by the legislation.

Sergeant Cline, I detect from your testimony you feel it ought to be ratcheted upwards to $50,000. Earlier today, Deputy Assistant Attorney General Schiffer thought that this could hurt in seeking settlements and would probably prove injurious to a conciliatory process.

I think most of you gentlemen have made your comments known as to whether or not you feel it ought to be in there. How would you feel if, instead of making it mandatory, we provided discretionary power to impose such a fine, so that it would more likely be seen as a last resort rather than something that would be staring the employers right in the face?

I think all of you have made a very persuasive case about how it's important that reemployment rights, as you said, Sergeant Cline, protect both employer and employee, that there is a "family", and the more we can promote voluntary compliance, the better for all concerned. So please speak to the discretionary aspects. Yes, General.

General HULTMAN. Yes, just very quickly, I think there's a time and a place for uniformity, but I think it ought to be the exception.

Like the Mikado says, "let the punishment fit the crime." I clearly think this should be discretionary, because you can imagine one extreme or another, totally different, and to treat them both with a $25,000 or $50,000 fine—and the capability. If you've got a little guy or gal here who has four employees, and they've got a very serious problem, but still they've violated the statute and the regulation, to impose a fine of $50,000 on somebody like this may put three more employees out of a job tomorrow. So I clearly think it ought to be discretionary.

Mr. CHRISTOPHER SMITH. Thank you.

Admiral Smith.

Admiral PHILIP SMITH. I think it should be discretionary. Also, I would suggest that some drafting words of art be used so that the punitive portion is clear on its face that it is for the more flagrant violations, the more aggravated violations, not for the routine perhaps oversight type things or the little things. I'm concerned about the effect it will have on the recruiting aspect.

Colonel SCHREIBER. I would echo what Admiral Smith has said.

Sergeant CLINE. We would amend our comments to go along with that, sir.

One thing that we have to look at on the enlisted side of the house is the fact that, as we have seen in the Gulf, the majority of the people that are going out in harm's way are the enlisted men and women. The average, from Department of Defense statistics, the average age of a Guardsman is 30 years old. He is just starting in the prime of his life. He's married, has 1.6 kids—I don't know how they get 1.6 kids; I haven't figured that out yet. Anyway, he is the guy who is in that $20–25,000 a year pay range, and he is the guy who is the truck driver, the milkman, the newspaper guy delivering papers to the corner store. He is out there working hard to make a living. There are more of them who are being affected.

Yes, we agree this should be the exception rather than the case.

Mr. CHRISTOPHER SMITH. I think your point, Admiral Smith, is well taken, that it ought to be written in such a way that it is for the more egregious, flagrant violator, rather than something that might be more unwitting.

Sergeant Cline, you point out in your testimony on page 5 that tax breaks for companies which comply with the veterans reemployment statute might be a good idea. I would say parenthetically that I have legislation pending that would offer tax credits for employers who continue health coverage during the course of the Active duty call-up.

Could you elaborate on your idea, and also if the other panelists might comment on that as well?

Sergeant CLINE. Basically, when we were looking at this bill, we felt that the penalty for the offense, if it was flagrant, should be increased. However, for those employers who are complying with it—in some cases, like AT&T, who are even supplementing the pay of our members while they're gone—we feel that some kind of tax incentive should be given to them.

Admiral PHILIP SMITH. I think any sort of incentive, reasonable incentive, for the employers, of course, is good. In our present fiscal environment, giving tax breaks is always a problem working into the budget.

Your bill, Congressman Smith, was that for the health insurance?

Mr. CHRISTOPHER SMITH. Yes, health insurance.

Admiral PHILIP SMITH. I think that would be a very good avenue to pursue.

General HULTMAN. I think it fits again in that category of anything we can do, especially on the small business side of the house, because they have the big problems in the area we're talking about. It isn't the big, giant employers.

In our survey of the Fortune 500 that we've had going on since August, and jabbing them in the process when we had one in a category who was making up the salary and somebody else is doing nothing, shaming them into getting on board. But it's the small employer that really has the ultimate problem that we're talking about here. Anything we can do, like on the Small Business Committee, like on the health issue, et cetera, I think that package is critical in terms of what the total force and the reserve side of that force, all volunteer, is going to be. Without those kinds of protections, without those kinds of capabilities, we are just going to make it impossible.

Colonel SCHREIBER. I hesitate to be the only one on the other side of the street. If I understand that proposal right, the only caution I would have is, we must remember, when they're called to Active duty, they immediately become available for medical benefits of the armed services. Whether this then overlays a second level of medical coverage at the cost of the taxpayers is something I think you would have to look at. I guess that would be about the only concern I would have on that.

Now, there is also legislation that requires that they be reinstated in their insurance program without a delay when they come back, which I think is a very good——

Mr. CHRISTOPHER SMITH. That was to ensure any preexisting health problem would also be covered.

Colonel SCHREIBER. Correct.

Mr. CHRISTOPHER SMITH. One of the reasons why it was proposed was that some of the benefits provided under the Government as opposed to many of the private plans, dental, for example, are not included. Things of that nature were some of the reasons why we thought this might be a good idea.

A couple of additional questions. General Hultman, you point out in your testimony—and I would say this ought to be a very high priority for anyone in government, the Federal Government in particular—that at least OPM and the Federal Government ought to have its act together in dealing with reemployment rights. You point out that the responsibility for reemployment rights of Federal workers is particularly lacking.

If you could focus on that for a moment.

General HULTMAN. Yes. Let me tell you, in my professional experience, in the area that we're talking about, I think the greatest violator—and now I'm talking about all degrees; I'm talking about intent, spirit, whatever you want to call it—is government. We have been talking about private employers, but I'm going to lay it right on the line. It will be the last comment I wanted to make.

Government itself is the biggest problem in the area that we're talking about—in the past. I'm not saying in the future, because I do think Lynn Martin, one of your colleagues, and Dick Thornburgh, and in the moment of euphoria that we're in, it's popular right now. We're going to do the right thing. But government has been the biggest violator and shortcomer in the area that we've been talking about.

As a U.S. Attorney, the problems in the area of reemployment rights, people being able to keep their jobs, government and quasi-government entities, beginning at the Federal level, then going to the State level, then going to the local level, and the post office is one of the primary ones, we have got to make certain—I think it's important that in your bill itself, in the legislation, you bring that point out loud and clear so that you leave no doubt in anybody's mind out there. Because five or 10 years from now, some of us aren't going to be here, or won't have that particular responsibility of a Lynn Martin or Dick Thornburgh or your committee, et cetera, et cetera. So I think you have to spell that out and leave no doubt in anyone's mind so that when a court sees it and hears it, there is no question in their mind what you meant.

Mr. CHRISTOPHER SMITH. One final question.

Admiral Smith, you referred to enforcement procedures in your testimony on page 5. Do you believe that the special counsel is appropriate for representation for Federal employees. And, General Hultman, you might want to touch on that, as well as the other panel members.

Admiral PHILIP SMITH. Yes, I do, particularly for the lower level—the post office, for instance, and the lower income personnel. Now they go to the Merit Service Protection Board and from then on their appeal is on their own. They have to use their own resources. So I think the committee's provision to provide—I'm sorry, it was the other draft to provide the Office of Special Counsel for the appeal is particularly important to protect the lower level employers with lower income, so that it gives them an opportunity to appeal without exceeding their resources.

General HULTMAN. I think that's just evening out the basic fundamental rights that we have in many, many other areas. I agree with that wholeheartedly.

Mr. CHRISTOPHER SMITH. If they go through an appeal, though—and that's when they lose the representation—what happens then? What do you think ought to happen?

General HULTMAN. I think clearly their representation ought to be there as in the original status. I see no reason why we should be changing to a different system at that particular time. Again, to throw that responsibility over on the individual at that point, it is more costly, more timely, and a greater burden. And if they do have a cause—I mean, they ought to be protected at that moment as well as they were at the beginning of the cause. So I think the prospective bill that has been put together, as I interpret it, although I haven't seen the last version, I think does address and would answer that particular need.

Admiral PHILIP SMITH. If I might add, it more or less levels the playing field.

General HULTMAN. Yes.

Admiral PHILIP SMITH. You do that for the private, city, county and state employee; you provide them representation. I think the Federal employee does not have it at the appeal level. It merely gives him the same level of protection that we now accord the other employees.

Mr. CHRISTOPHER SMITH. Very good. Thank you very, very much for your testimony.

Mr. PENNY. Thank you, gentlemen, for your participation this morning. Thank you, Chris, for that excellent line of questioning.

We will proceed now to our last panel, Mr. James Hubbard, Director, National Economic Commission, the American Legion, and Mr. Ronald Drach, National Employment Director, Disabled American Veterans.

As soon as you're seated, Mr. Hubbard, you can proceed with your testimony. Ron, we're glad to have you as well.

STATEMENT OF JAMES HUBBARD, DIRECTOR, NATIONAL ECONOMICS COMMISSION, THE AMERICAN LEGION

Mr. HUBBARD. Mr. Chairman, in the interest of time, I will be very brief.

I have not had time to adequately look at the administration's proposal. I wil tell you that the committee draft is a good bill and we are prepared to help you with this.

I have a couple of suggestions for additions perhaps. One is access to juries by employees seeking redress in the courts. If either the veteran plaintiff or the employer defendant, requests a jury trial, that option should be available.

The only other thing that I can suggest is an addition—it's been brought up earlier this morning—that perhaps U.S. Attorneys offices are going to be overburdened with the prosecution of other types of cases, and I would therefore like to see remuneration for counsel from the defendant employer to the plaintiff veteran if such veteran wins his case.

Those are the only two additions I would suggest to the bill. Thank you very much. I will be happy to answer any questions.

[The prepared statement of Mr. Hubbard appears at p. 84.]

Mr. PENNY. Thank you, James.

Mr. Drach.

STATEMENT OF RONALD W. DRACH, NATIONAL EMPLOYMENT DIRECTOR, DISABLED AMERICAN VETERANS

Mr. DRACH. Mr. Chairman, thank you. I am very appreciative of the fact that you all are having these hearings today. I would like to summarize my statement by just going through some of the highlights of it and adding a few things that are not in the prepared statement.

I was pleased to hear that the Department of Labor, or the administration—I shouldn't say the Department of Labor; they're not totally and wholly responsible for its delay—but that the administration finally got its draft bill up to you. I do want to point out, however, that the Department of Labor, about 3 years ago, announced they were undertaking a major rewrite of the reemploy-

ment rights statute, and it has taken them 3 years to get this thing up here. So while we welcome it, it is long overdue.

I would also like to point out that we have not had an opportunity to review the administration draft. Apparently the National Guard Association and others have better contacts than we do, in that they were able to get an advanced copy of it. But we look forward to reviewing it in the context of what you have drafted and getting back to you with some of our other views on it.

I would like to digress for a moment, if I may, Mr. Chairman. I know the discussion has revolved around particularly the VRR and as it relates to reservists and the National Guard. First of all, your bill and the present law does not restrict it only to reservists and National Guard. It is for actual enlistees, also. So let's not forget about them.

I would also like to mention that while the administration, and particularly the Department of Labor, has focused in on the VRR provisions and potential problems, they have overlooked, I think, the need to address the problems of those who don't have reemployment rights. Perhaps this is a more appropriate subject later on for an oversight hearing. But I would like to point out that the average age of the infantrymen over in Saudi Arabia is 20 years old. Most of them probably do not have reemployment rights. Most of them are probably going to be discharged.

Someone from the Department of Defense mentioned in an article the other day that he is very concerned that, now that the war is over, we're no longer going to need these individuals and they're going to be let loose on a civilian economy that's not ready to absorb them.

Mr. Collins mentioned that, for the disabled veteran, the services of a DVOP. Well, we know that unless something happens with the extension, which you all have passed on this side, H.R. 180, we're not going to have DVOPs next year. That may be the time most critical that a lot of these more severely disabled veterans need them, because it may take six, eight or 9 months for them to recuperate and be ready to go into the labor market. I haven't seen anything from the administration to either support H.R. 180 or to offer any alternative. I think they need to get on that real quick, and hopefully it won't take them 3 years as it did with the VRR.

We are also very optimistic that there aren't going to be a whole lot of reemployment rights complaints. We do believe that there are going to be a lot of inquiries, and I think there's a major difference. There are going to be employers that aren't really sure what their obligations are and they are going to ask. There are going to be veterans who aren't sure what their rights are and they're going to ask. I think, more often than not, it is not going to be an actual complaint of employers refusing to reemploy or otherwise restore the individuals. It is going to be more a question of "I want to do what's right, help me do what's right, and let's get on with business."

I think it would be a foolhardy employer who would want to get headlines in the local newspaper that they refused to reemploy a reservist or a National Guardsman who just came back from the Gulf.

Another reason for our optimism is that in the statement I outline several steps that have been taken by not only OPM but also by other private sector employers to make sure that the returning veterans and returning troops are accorded their rights, as should be.

We do have a couple of other recommendations and concerns. We are not really sure how to address the issue of temporary positions. We have had some experience in the Federal sector where—unrelated to VRR, per se—but where agencies will sometimes use temporary positions to avoid personnel ceilings and otherwise sometimes circumvent the Federal hiring system. I think that needs to be looked at, because we want to make sure that people who leave sometimes temporary positions from the Federal Government may be restored to a like or similar job when they come back.

There's no easy answer for it and I don't have an answer. It is just that we would like to work with you and try to develop an answer for it.

We would also recommend that you take a look at the one year time frame for the disabled veteran, someone who gets injured over there or injured in the service. Some of the more severely disabled may not be ready to go back to work within that one year. There was some discussion about it earlier. I think there's an excellent opportunity to bring together the services of the Department of Labor and the VA's voc rehab department, as well as the family member and the individual and the employer, to work out a rehabilitation plan that may even be in conjunction with an on-the-job training program for the employer to take advantage of, to get that person back to where they can perform a job that they can otherwise do.

We also will have the additional protections of the Americans With Disabilities Act, in those cases where there is out-and-out discrimination against some individual, so that the double threat of VRR and ADA may be that much more beneficial—although I guess I don't want to use the word "threat" because I think most employers want to do what's right and will do what's right.

The last area that I wish to cover is the Federal employees, and it has been discussed to some extent. The bottom line, as I understood the comments about the administration's draft, as well as your own draft, you do extend some representation. But I don't think it goes quite far enough. Right now, the private sector employee, the returning veteran, can receive assistance and representation all the way up to the Supreme Court. I think that the returning Federal employee also has to have that same right.

I will be happy to answer any questions. Thank you.

[The prepared statement of Mr. Drach appears at p. 86.]

Mr. PENNY. Thank you.

Ron, you touched on this to some degree. We're not going to face, thankfully, a great deal of this with those returning from the Gulf, but how big a problem would it be to protect reemployment rights for those who had a disability that limited their capacity to handle their previous job responsibilities and would you need to fall back on the ADA to secure that person's employment rights, or is there enough strength in the VRR to handle those circumstances?

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Mr. DRACH. I think historically, Mr. Chairman, there has been enough in the VRR statute, and probably will be enough, to add those protections.

I think what the employer community and we in the veterans community may be able to draw from the ADA is, number one, the additional protections that ADA affords, if necessary. But secondly, there are some provisions of ADA that are going to evolve eventually into some court interpretations of what's a "reasonable accommodation." I heard that word used this morning. That term has been around since the mid-Seventies, and a lot of people still don't know. The advocates don't know, the enforcers don't know, the attorneys don't know, and the courts don't know. Maybe with ADA and subsequent interpretations from the Justice Department and others "reasonable accommodation" will be better defined.

But I think, if there's a concerted effort between the employer—With the resources that are out there, there's a lot of new technology out there for disabled people that has evolved over the years. The Job Accommodation Network that's at the University of West Virginia is available to employers to help them redesign jobs, to help them provide needed equipment and necessary technology to provide new types of jobs. So I think, going back to my earlier comment, you get with the VA voc rehab people and you get with the employer who is willing to do this, and the actual individual.

I think one of the crucial things in the whole rehab aspect for the disabled veteran is we've got to talk to them. We can't let the voc rehab people and the employer do it. We have got to bring that disabled vet, himself or herself, into that dialogue and find out what's best.

Mr. PENNY. I think your suggestion that somehow we have to coordinate that effort for those with a serious disability, one that may take a matter of months after discharge in order to at least work through rehabilitation or whatever, I'm not sure we can sort that out in time to include it in this legislation, but we may want to consider separate legislation to deal with that question. We would certainly want to work with your organization in that regard.

Mr. DRACH. Thank you.

Mr. PENNY. Mr. Smith.

Mr. CHRISTOPHER SMITH. Thank you very much, Mr. Chairman. Welcome to our two panelists.

Mr. Drach, you point out in your testimony on page 4 that you're concerned about the potential abuses of the Federal Government in using temporary positions to circumvent reemployment law. I wonder if you might want to elaborate on that. You point out that you don't have any specific recommendation at this time, but you might give us some advice and counsel.

Mr. DRACH. To some degree, Mr. Smith, we're also operating at a disadvantage, as I mentioned in my testimony also, that in the past 15 years I cannot recall ever receiving an actual reemployment rights complaint from a veteran. We have received inquiries as to what their rights are and so forth, and we have made the appropriate information available to them. But they have never gotten back to us, so we're assuming that those problems have been resolved.

So that we're operating at a disadvantage in that we have no experience.

In terms of the temporaries, I say that only because we address the issue in the draft legislation, that temporary positions can be exempt or may be exempt from the reemployment rights protections. We have seen cases, again unrelated to VRR, where disabled veterans have come to us, not from a reemployment standpoint but from an unemployment standpoint, saying that—And I'll give you an example. The Tennessee Valley Authority is notorious. They hire a lot of people, veterans and nonveterans, on appointments not to exceed 360 days. They don't get their full-year tenure. Therefore, they don't get career status. Therefore, they don't get a lot of other benefits. They lay them off for a month, or 2 months, and then they recall them and they rehire them 3 months later for another temporary appointment.

Well, that could possibly be a reservist who might get called up, and then comes back, and they had a temporary position before the went. Other agencies just use it to avoid personnel ceilings sometimes, where they will hire somebody in a temporary position. It's not uncommon.

Mr. CHRISTOPHER SMITH. Mr. Drach, you point out in your testimony that you feel that the $25,000 fine ought to be used only in extreme cases. You heard the discussion with the other panel about discretionary versus mandatory. I wonder if you might speak to that issue, and you as well, Mr. Hubbard.

Mr. DRACH. Yes. I think I misunderstood the draft, because my comments would lead you to believe that I did think it was discretionary. I would agree that it should be discretionary.

Mr. CHRISTOPHER SMITH. Mr. Hubbard.

Mr. HUBBARD. I wouldn't disagree with that, Mr. Smith. My sense is that for large employers, those companies employing more than a thousand people on their payroll, are not going to be the problem with the reservists and Guards people that have been called to the Middle East.

I have an ongoing survey of the top 2,000 companies in this country. We're still getting returns back. I have about 170 returns back so far. The number of people called is not large. The companies with the largest number of people called are companies like Delta Airlines and the reason there is obvious. They're using pilots.

So I think, given the number of reservists and members of the National Guard who have been called, that it is the small employers who are going to be the most affected and have the most questions about VRR. You can put a small employer out of business with a mandatory fine of $25,000. I don't think that's in the best interests of either the returning reservist or member of the National Guard or the employer. It ought to be discretionary and not mandatory.

Mr. CHRISTOPHER SMITH. Thank you.

One final question. Mr. Drach, you point out and make what I consider to be a very legitimate point, in your testimony on page 5, that one year may not be enough to retrain the disabled veteran to return to his or her previous job. You propose that individual rehabilitation plans should be formulated for these veterans.

Do you believe that any kind of limit ought to be imposed or that this ought to be discretionary as well, or left up to the VA?

Mr. DRACH. May I just offer one final recommendation before I answer that and before I forget.

I think whatever legislation is ultimately reported out, there should be a requirement for the Department of Labor to report back to Congress on the incidents of complaints, et cetera, so that we have something to look at this a year from now or 18 months, whatever.

I thought about that when I was writing the testimony, Mr. Smith, and I think we have to have some reasonableness applied here. But I looked back at some of the casualties that came out of Vietnam, and I think of people like Chad Colley, Past National Commander of the DAV, a triple amputee. Do we say to him, you know, "get your act together in 18 months or your rights disappear"? We have people on our staff that are multiple amputees that were in the hospital in excess of a year because of medical problems, even before they started the rehabilitation process. So I think there has to be a sense of reasonableness applied here.

I think if we get with the employer early, we get with the veteran early, we get with the voc rehab people, and we say "okay, this is going to take 12 months or 18 months", the fact is that we have reported back to the employer, the individual has exercised his obligation to say I want my job back, or a similar job back, but it's going to take a while.

Now, you couple that with an individualized employment assistance program through voc rehab, which is available right now, I think we can get a lot of these people—especially out of the Gulf. From what I've heard, the casualties are not all that severe. I think most of them should be able to get back to work even within that year. But we need to have some reasonableness in there, I believe.

Mr. CHRISTOPHER SMITH. Thank you very much for that insight, and thank you both for your testimony.

Mr. PENNY. Thanks again for your participation this morning. I think this is an excellent hearing. We have a few differences with the administration's draft. It appears to me, though, that the differences are not so great that we can't get them worked out quickly. We look forward to your continued involvement in the discussions as we move quickly to wrap up this legislation and bring it before the full committee.

Thank you.

Mr. DRACH. Thank you.

Mr. HUBBARD. Thank you, Mr. Chairman.

Mr. PENNY. The subcommittee is adjourned.

[Whereupon, at 11:20 am., the subcommittee was adjourned.]

APPENDIX

PREPARED STATEMENT OF

HONORABLE STEPHEN M. DUNCAN

ASSISTANT SECRETARY OF DEFENSE FOR

RESERVE AFFAIRS

HEARING BEFORE THE

COMMITTEE ON VETERANS' AFFAIRS

SUBCOMMITTEE ON EDUCATION, TRAINING, AND EMPLOYMENT

UNITED STATES HOUSE OF REPRESENTATIVES

ON VETERANS' REEMPLOYMENT RIGHTS

MARCH 7, 1991

FOR OFFICIAL USE ONLY
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THE SUBCOMMITTEE

ASSISTANT SECRETARY OF DEFENSE

FOR

RESERVE AFFAIRS

Stephen M. Duncan was nominated by President Reagan to be Assistant Secretary of Defense for Reserve Affairs on August 7, 1987, and was confirmed by the United States Senate on October 23, 1987. He was reappointed to that office by President Bush on June 20, 1989.

As Assistant Secretary, Mr. Duncan serves as the principal staff assistant and advisor to the Secretary of Defense on all matters involving the 1.68 million members of the Reserve components of the U.S. Armed Forces, including the Army National Guard, Air National Guard, Army Reserve, Air Force Reserve, Naval Reserve, Marine Corps Reserve, and Coast Guard Reserve. He also serves separately as the Department of Defense Coordinator for Drug Enforcement Policy and Support. In that capacity, he acts as the principal assistant and advisor to the Secretary for all policies and programs of the Department of Defense in support of the President's crusade against illegal drugs. For his service as Assistant Secretary, he has received the Department of Defense Medal for Distinguished Public Service.

Mr. Duncan was born in Oklahoma City, Oklahoma, on March 28, 1941. He graduated from the U.S. Naval Academy in 1963, receiving his Bachelor of Science Degree and a commission as Ensign, U.S. Navy.

He served as a deck and watch officer aboard U.S.S. ESTES (AGC-12), an amphibious flagship which directed amphibious landings near Chu Lai, Vietnam in the Spring of 1965. He subsequently served as the Weapons Officer aboard U.S.S. CARRONADE (IFS-1), the flagship of a division of four rocket ships which provided close-in gunfire support to ground forces in Vietnam. His combat decorations include the Navy Commendation Medal (with Combat "V"), the Combat Action Ribbon, the Republic of Vietnam Cross of Gallantry (Bronze Star), the Navy Unit Commendation and various other unit citations and campaign medals related to his service in Vietnam.

In 1967, Mr. Duncan was appointed Assistant Professor of Naval Science at Dartmouth College, where he taught Naval Engineering and Naval History. He received his Master of Arts Degree in American Government from Dartmouth College in 1969.

Mr. Duncan transferred to the U.S. Naval Reserve in 1969. At the time of his first appointment in 1987, he held the rank of Captain, U.S. Naval Reserve. He is a recipient of the Armed Forces Reserve Medal.

Assistant Secretary Duncan attended the University of Colorado School of Law and received his Doctor of Jurisprudence Degree in 1971. He served as Assistant U.S. Attorney in 1972-1973. From 1973 to 1987 he was engaged in the private practice of law in Denver, Colorado, most recently as a partner in the Denver firm of Hopper, Kanouff, Smith, Peryam, Terry and Duncan. His practice was concentrated in the trial and appeal of complex commercial disputes in both federal and state courts.

Mr. Duncan is a member of the Bar of the U.S. Supreme Court, the State of Colorado, the U.S. Court of Military Appeals and other federal courts. He is a member of the faculty of the Trial Advocacy Institute at the University of Virginia School of Law and in 1982 he was elected a Fellow of the International Society of Barristers. He has published articles in various professional journals. He has served as an elected member of the Board of Governors of the Colorado Bar Association and the Board of Trustees of the Denver Bar Association.

Assistant Secretary Duncan is married to the former Luella Rinehart of Santa Monica, California. They have two daughters. Kelly is a 1990 graduate of the U.S. Naval Academy and is serving on active duty with the Navy. Paige is a college student.

Mr. Chairman and Members of the Committee.

I am very pleased to appear before you today to discuss the proposed legislation which would amend Chapter 43 of Title 38 of the United States Code, involving reemployment rights of military veterans. The fundamental right protected by this statute is the right of reinstatement to employment following military service, including protection of seniority, status, and rate of pay.

Statutory employment protections for members of the Armed Forces were first enacted just prior to the Second World War. Provisions extending employment protections to cover training in the Reserve components were added in 1951. Other important provisions affecting Reservists were added in 1960. In 1968, additional protection was adopted which prohibits discharge from employment or denial of promotion or other incidents of employment, because of an individual's membership in the Reserve components. Due in major part to the efforts of this Committee, important provisions prohibiting discrimination against Reservists in the hiring process were added in 1986.

These statutory provisions are of immense importance to the Department of Defense generally and to the members of the uniformed services in particular. They are especially important to members of the National Guard and federal Reserve forces. Over 80 percent of the enlisted members of the Selected Reserve and nearly 90 percent of the officers are employed in the civilian sector. Whatever incentives may be put in place to encourage recruiting and retention in the Reserve components, the incentives are almost certain to be inadequate if Reservists are not confident that their military service will not result in the loss of their full-time civilian employment.

The progressive piecemeal changes which have been made to the current Veterans' Reemployment Rights statute, changing circumstances and requirements associated with military duty, and new laws and practices covering pension plans and health benefits, have made the current statute complex and difficult to interpret. To the extent that ambiguities exist, they have potentially serious consequences with respect to the basic right provided by the statute -- reinstatement to previous employment following military service. Indeed, on February 19, 1991, the U.S. Supreme Court agreed to consider a case involving the reemployment rights of a Reservist because of an ambiguity in the current statute. The issue in question has been decided differently by the federal circuit courts of appeal.

As a former Assistant United States Attorney, I have had first-hand experience in representing the government in cases where ambiguities of law raise doubts about the intent of Congress. Consequently, I believe that a revision to the current statute is required to ensure that we can continue to meet the original intent of Congress in establishing reemployment rights for veterans-- i.e., the elimination of disincentives to military service caused by a fear of loss of civilian employment opportunities.

Recognizing that progressive changes in the statute coupled with changing circumstances of military duty have resulted in a law which needs comprehensive revision, an Interagency Committee was formed in 1987 to review the current law and to recommend legislative changes. Representatives from the Departments of

Defense, Labor, Justice, and Veterans Affairs joined in the effort. The proposed legislation which is the product of the Interagency Committee has received a detailed review within the Administration. The result of this extended and concentrated effort is the proposed "Uniformed Services Employment Rights Act of 1991," which was recently forwarded to the Congress.

It is important to note that the proposed legislation would apply to members of all seven uniformed services who return to civilian life after military duty or training, not just Reservists. I have been informed by the Department of Labor, however, that the great majority of the cases which it handles involve Reservists. Moreover, the cases involving Reservists are among the most complex.

In considering these matters, Congress has concluded that "the support of employers and supervisors in granting employees a leave of absence from their jobs to participate in military training without detriment to earned vacation time, promotions, and job benefits is essential to the maintenance of a strong Guard and Reserve force." I agree. The Department of Defense also subscribes to the view of Congress that enthusiastic voluntary cooperation and support from employers is critical to successful Reserve programs, but that statutory protections and an enforcement mechanism form a necessary foundation for this cooperation.

It was for the purpose of fostering cooperation, understanding and voluntary support by employers of their employee-Reservists that the National Committee for Employer Support of the Guard and Reserve, an agency within my office, was originally established. Through effective communication of the role and importance of Reserve forces within the Total Force, we believe that we can gain the support of employers in establishing personnel policies and practices that will encourage, or at least not obstruct participation by their employees in Reserve programs.

The National Committee is a grass roots organization which supports state-level Employer Support Committees, involving over 3,700 volunteers who are influential members of local business, labor, and professional communities in all fifty states, the District of Columbia, Puerto Rico, the Virgin Islands, Guam and Saipan. The National Committee develops public information programs, including television and radio spots which are directed at employers, supervisors and the public to increase the understanding of the role of National Guardsmen and Reservists in the Total Force and the importance of military training time. The Committee establishes contacts with professional, business and labor associations and seeks to obtain official statements of support from associations and their member firms.

The National Committee also works to foster understanding of the legal rights and obligations of both citizen-soldiers and their employers. During Operations DESERT SHIELD/DESERT STORM, additional telephone banks and a 24-hour telephone watch were established to answer a wide range of questions from both Reservists and employers. Volunteer civilian members of the National Committee in the individual states were asked to visit mobilization sites to answer questions about employer-related matters. Difficult or complex questions were referred to representatives of the Department of Labor.

The great majority of employers want to do what is right and are supportive of their employee-Reservists who join and serve in

the Armed Forces. During Operations DESERT SHIELD/DESERT STORM, many employers have gone far beyond what the law requires in support of their employee-Reservists who have been activated. The proposed statute which we are discussing this morning would serve as an important reference point for such support.

Permit me to briefly outline what I believe to be some of the most important features of our proposal. First it would eliminate distinctions in the protections afforded under the law based on categories of persons or types of duty. Many of the existing distinctions are no longer warranted, nor are they relevant to the employment relationship. Under existing law, for example, those persons who enter active duty for a period of less than four years have 90 days within which to apply for reinstatement with their former employer. Reservists entering training duty (other than initial active duty for training in excess of 12 consecutive weeks), must report for work at the next scheduled work period after their return. Those who perform initial active duty in excess of 12 weeks or are ordered to active duty for 90 days or less under section 673b of Title 10, United States Code, have 31 days within which to apply for reemployment. Just last week, this body cleared legislation for the President to clarify the latter provision of law to include any period of extension of service under the section 673b provision.

These distinctions are unlikely to be of concern to employers. The most significant factor to an employer is the length of time his employee is absent. Under the proposed revision, the time period which the returning servicemember will have in which to report to his or her preservice employer will depend upon the duration of the service or training. For example, a member whose service was for fewer than 31 days will be required to report to work on the first day after completion of the service. If the service was 181 days or more, the member will have up to 90 days to request reemployment and report for work. This will be easier to understand and apply.

Second, the proposed legislation would clear up existing confusion on the length of military training that is protected. The current statute protects the employment of Reservists who perform military training duty but it does not expressly address the timing, frequency or duration of the training. The federal courts of appeals are divided on the proper interpretation of the law on this point. It is self evident that a Reservist must know with certainty when he or she complies with orders to military training duty that the legitimacy of the orders with respect to the timing, frequency or duration of training will not be questioned. The proposed legislation would eliminate the confusion on this point: "In determining a person's entitlement to rights and benefits... the timing, frequency, and duration of any person's training or service or the nature of training or service... shall be presumed to be reasonable and protected... and training or service which the person volunteered for shall be entitled to the same protection as training or service imposed upon the person as a legal obligation."

A third important feature of the proposed legislation would be its clarification of the existing coverage of federal employees. The amendments to Title 38 of the United States Code would reiterate that the reemployment obligation applies to the federal government just as it applies to any other employer. The proposed legislation would add a new Chapter 92 to Title 5 of the Code. The proposed new chapter would make it clear that the federal

government should be a model employer with respect to the purposes and policies set out in the employment rights law for members of the uniformed services. It would also clarify appellate procedures under which federal employees could seek to enforce reemployment rights when a federal agency has failed or refused to comply with its obligations under the law.

The final feature of the proposed legislation which I want to note here is its treatment of health and pension benefits. The importance of these benefits has greatly increased since the last major revision to the Veterans' Reemployment Rights statute. During this period of time other federal laws, such as the Employee Retirement Income Security Act (ERISA) and the Consolidated Omnibus Budget Reconciliation Act (COBRA), have been enacted. The proposed legislation would set out clear and reasonable rules relating to these benefits which are fair and consistent with other legislation in the benefits area. It would also ensure that National Guardsmen and Reservists do not lose health or life insurance benefits, for themselves or their dependents, because of the performance of short tours of training duty. The provisions of the legislation which relate to health benefits would, in my judgment, effectively complement those provisions relating to health insurance reinstatement upon reemployment that were included in the Soldiers' and Sailors' Civil Relief Act Amendments of 1991. The Congress passed that legislation last week.

There are many other positive features of the proposed legislation which you are considering today. It is consistent in intent and generally consistent in substance, Mr. Chairman, with the discussion draft bill which you earlier provided for our review.

Last September, in my testimony before a joint session of the Committees on Veterans' Affairs of the Senate and the House of Representatives, I stated that the Department of Defense strongly supported the comprehensive legislative proposal to revise the Veterans' Reemployment Rights statute which was then being coordinated within the Administration. The Department strongly supports the bill which has now been forwarded for your formal consideration. It will provide important protections not only for the thousands of National Guardsmen and Reservists who have served during Operations DESERT SHIELD/DESERT STORM, but also for those citizen-soldiers, sailors, marines, airmen, and coast guardsmen who will be a critically important part of the Total Force in the future.

Thank you.

Statement of Thomas E. Collins
Assistant Secretary for
Veterans' Employment and Training
Before the
Subcommittee on Education, Employment and Training
House Veterans' Affairs Committee
U.S. House of Representatives

March 7, 1991

Mr. Chairman and Distinguished Members:

Thank you for the opportunity to appear today. I certainly share your Subcommittee's timely interest in strengthening the Veterans' Reemployment Rights program.

Review and modification of benefits and protections available to veterans, including veterans of the Persian Gulf conflict, should be done in a coordinated, rational way and not on a piecemeal basis. Further, any modifications which result in increased costs, must fit acceptably within the overall parameters of the Budget Agreement. These principles were taken into account during preparation of the Administration's draft veterans' reemployment rights bill, which I will be discussing in a few minutes.

The Administration welcomes the opportunity to participate in a process that reviews veterans' proposals comprehensively, applies rational criteria to their assessment, and fits them within the Budget Agreement.

The citizen-soldier is an American tradition. Throughout our history, Americans have left their civilian pursuits to defend the Nation and the principles of liberty and justice we cherish.

The conflict in the Middle East has been no exception. Thousands of men and women serving in National Guard and military reserve units were called to active duty to respond to an act of aggression that challenged and threatened all who value freedom and rule of law. We hope they, along with our regular active duty forces, soon will be coming home -- returning to the families they left to serve our Nation in support of Operations Desert Shield/Storm.

Under Title 38 of the United States Code, Chapter 43, returning veterans, including demobilized Reserve Component members, have a right to return to the positions they left to go on active duty. Since 1940, the Veterans' Reemployment Rights (VRR) law has protected employees who have left civilian positions for voluntary or involuntary military service. Upon completion of their active duty, they are entitled to return to their civilian positions with the precise seniority, status and rate of pay they would have obtained if they had remained continuously employed. Amendments to the law gave Reserve and National Guard members the right to leaves of absence from their civilian jobs to participate in military training, and protected them from related discharge or discrimination by their employers because of their military obligation.

The philosophy behind the Veterans' Reemployment Rights law is simple and straightforward: Those who serve the Nation have earned the right to return to their civilian positions without penalty or delay. Even before this latest military action required activating large numbers of Reserve and National Guard members, it had become evident that the VRR law has become a confusing and cumbersome patchwork of statutory amendments and judicial constructions, including 15 Supreme Court decisions and hundreds of Circuit Court decisions. This has caused confusion and hampered the Department of Labor's (DOL) ability to resolve quickly those claims filed by returning servicemembers and provide complete and useful general information concerning rights or obligations to servicemembers and employers.

Because of these concerns, the Administration is proposing a comprehensive revision of the VRR statute, to clearly secure the reemployment rights for all those who are eligible, including the Reserve Component members who were activated to support OPERATION DESERT STORM. This proposal contains clear statutory language and is not dependent upon multiple judicial interpretations. In addition, we believe the new bill, through quicker and more timely resolution of differences, may reduce case load and litigation.

Mr. Chairman, I am pleased with your interest in updating the Veterans' Reemployment Rights statute as evidenced in your "discussion draft." I am particularly pleased to share with you some highlights of the Administration's proposal, which is called the Uniformed Services Employment Rights Act or "USERA". The USERA continues the rights and benefits of the current law. It would revise the VRR law, however, to make it more easily enforceable, particularly with respect to the application of the law to Reserve Component members. The Administration's proposal would:

- Help close gaps in health insurance coverage,
- Continue to provide similar protections for Federal employees and non-Federal employees,
- Eliminate distinctions between categories of military training,
- Make the law more understandable,
- Outlaw employer reprisals for claimants, and
- Assist recruitment and retention of reservists and members of the National Guard to support the Total Force policy through better job protection.

We believe these improvements to the VRR law, while retaining and continuing the basic focus and rights in the current law, provide the best means to protect those returning to civilian life. For example, the current law is a remedial, not a punitive, statute. We believe that continuing this policy, rather than instituting punitive provisions such as a civil penalties provision, encourages a cooperative approach with the employer. Our experience has not shown that there is any need to convert the reemployment rights statute in this manner.

The Administration's proposal also provides that the Justice Department will have the authority to represent returning servicemembers in court. The bill also adds a new enforcement procedure for Federal employees. This procedure requires the Office of Special Counsel to represent those employees before the Merit Systems Protection Board.

We also believe that, as in the Administration's proposal, employees of the District of Columbia, for the purpose of these rights only, should be treated as if they were employed by a State--not as Federal employees. This reflects the fact that the District now has its own personnel system, which is completely independent from the Federal system and the Office of Personnel Management. Because of this, we believe that the reemployment rights of District of Columbia employees would be more effectively and efficiently enforced if the District of Columbia were treated as though it were a State for purposes of this legislation.

In addition, we also note that the Administration bill would reinforce the very important policy of reinstating the returning employee without unnecessary delay.

Protecting the job rights of the men and women who will soon return from military service is the responsibility of the Labor Department. It is a responsibility we welcome, and one that will get priority attention in the months to come. Happily, it is also a responsibility that may not result in an unmanageable increase in case load if we can simplify this law and provide adequate and timely information to Reserve and National Guard members and employers.

There is every indication that most employers will be more than willing to restore to their positions with no loss of benefits the thousands of men and women who answered the country's call to duty during the crisis in the Middle East. Many employers, in fact, already have gone beyond the requirements of the law. Some continued to give their employees who went on active military duty their full civilian pay. Others made up all or part of the difference between reservists' civilian pay and benefits and their military compensation. No less patriotic are the thousands of employers who will fulfill their VRR obligations without a problem.

These voluntary actions are an encouraging sign that those returning from this conflict will not face the indifference and even hostility that so many Vietnam veterans tragically had to endure.

I thank you again for the opportunity to discuss proposed changes to the Veterans' Reemployment Rights Act. I look forward to working with you in accomplishing these objectives that the Administration has outlined. I am accompanied today by John Depenbrock, Associate Solicitor of Labor for Labor-Management Laws. We would be pleased to answer any questions you may have.

Department of Justice

STATEMENT

OF

STUART E. SCHIFFER
DEPUTY ASSISTANT ATTORNEY GENERAL
CIVIL DIVISION
DEPARTMENT OF JUSTICE

BEFORE THE

SUBCOMMITTEE ON EDUCATION, TRAINING AND EMPLOYMENT
COMMITTEE ON VETERANS' AFFAIRS
HOUSE OF REPRESENTATIVES

CONCERNING

VETERANS REEMPLOYMENT RIGHTS

ON

MARCH 7, 1991

Mr. Chairman and Members of the Subcommittee:

We appreciate the opportunity to set forth our views on the discussion draft bill to amend Chapter 43, Title 38, U.S. Code (Veterans Reemployment Rights). We welcome the Subcommittee's interest in this important area, which is especially timely in light of the recent successful efforts of our military forces in the Persian Gulf.

Before I discuss the Committee's draft bill, I would like to note that the Administration believes that the review and modification of benefits and protections available to veterans, including veterans of the Persian Gulf conflict, should be done in a coordinated, rational way and not on a piecemeal basis. Further, any modifications which result in increased costs must fit acceptably within the overall parameters of the Budget Agreement.

The Administration welcomes the opportunity to participate in a process that reviews veterans proposals comprehensively, applies rational criteria to their assessment, and fits them within the Budget Agreement. To facilitate the business of this Committee, I will comment on the Committee's draft bill concerning the Veterans' Reemployment Rights program -- subject to two qualifications: 1) these proposals must also be considered in the comprehensive context I have described; and 2) Administration support for particular measures is contingent upon an overall package that meets the tests suggested.

We urge the Subcommittee to consider adopting certain important modifications to the discussion draft bill ("Draft Bill").

These modifications are included in an Administration bill, the "Uniformed Services Employment Rights Act of 1991," which has been sent to Congress. This bill has received review and comments from all interested agencies; it corrects the problems we note below in the Draft Bill. Therefore, we urge the Subcommittee to act expeditiously on the Administration bill, which is fully supported by the Department of Justice.

The present Veterans Reemployment Rights ("VRR") statute (38 U.S.C. §§2021-2026) was first enacted shortly before World War II. It requires that, under certain specified conditions, employers rehire veterans, reservists, and National Guard members who have been absent from their employment for active military duty or training.

The Department of Justice and our United States Attorneys, in conjunction with the Department of Labor, have been closely involved with the implementation of VRR rights for veterans and reservists, including National Guard members since, if disputes with employers cannot be amicably resolved (and, by far, most of them are), the VRR statute gives a right to the service member to have the Department of Justice represent him or her in any court action against an employer.

Problems have arisen with implementation of the existing statute, particularly in the area of reemployment rights for

reservists, as our military forces have utilized reservists much more in the last few years. Years ago, reservists and guard members usually performed their training on weekends and at two-week summer camps. Now, they are often required to spend several months or years in training and, as in Operation Desert Storm, may be away on active duty for several months at a time.

In some cases, employers have objected to extended absences for reservists and guard members. A good example of this is a recent case which involved a request by a Command Sergeant Major in the Alabama National Guard for a three-year leave of absence from his employer, a hospital, in order to go on active duty. King v. St. Vincent's Hospital, 901 F.2d 1068, (11th Cir. 1990), cert. granted, 59 U.S.L.W. 3545 (U.S. Feb. 19, 1991) (No. 90-889). The United States Court of Appeals for the Eleventh Circuit held that a three-year leave of absence is per se unreasonable and ruled that the hospital need not grant such leave to an employee.

Other courts have also applied a "reasonableness" standard to requests by reservists and National Guard members for leaves of absence for military duty. Gulf States Paper Corp. v. Ingram, 811 F.2d 1464 (11th Cir. 1987); Lee v. City of Pensacola, 634 F.2d 886 (5th Cir. 1981). But see Kolkhorst v. Tilghman, 897 F.2d 1282 (4th Cir. 1990).

At our request, the Supreme Court has granted certiorari to hear the King case. We believe it was wrongly decided since, in our view, even under the existing VRR statute, courts should not

engraft their own concepts of "reasonableness" on the length of leaves of absence which military necessity may require for reservist and guard members.

Cases such as the King case and others, however, have highlighted features in the existing VRR statute which are not well-adapted to the more modern concept of making reservists and National Guard members an integral part of the active military services. Therefore, beginning in 1987, we have participated in an inter-agency Working Group established by the Department of Labor, the Department of Defense, and other interested agencies to consider amendments which would preserve and maintain the basic rights of existing legislation, but which would clarify and modernize the present statute. We hoped that this would avoid litigation where possible, or at least make such litigation less expensive and time-consuming to veterans and employers alike.

Some of the results of these efforts are included in the Draft Bill, which we largely agree with and believe would simplify litigation of VRR cases. We think that it is particularly important for the Subcommittee to consider these issues now because of the current extensive call-up of reservists for Operation Desert Storm in the Persian Gulf. While, hopefully, most reservists returning from their overseas duty will not face reemployment problems, given the large number of reservists, some complaints will undoubtedly be filed against employers. We at the Department of Justice believe that passage of an updated and modernized VRR bill would significantly aid our

representation of veterans in court when that becomes necessary. In-this regard, we urge you to review the Administration's bill, which effectively accomplishes this purpose.

We do, however, have certain objections to the Draft Bill in its present form which are important to point out to the Committee. First, Section 2041 of the Draft Bill requires that "representation of any person by the Secretary in any court of the United States shall be by agreement between the Secretary and the Attorney General." This language could detract from the policy that the Attorney General is in charge of government litigation.

This policy has its historic roots even before the 1870 consolidation of the Attorney General's functions, when the Supreme Court recognized that the Attorney General is the proper official to present the government's legal position. Confiscation Cases, 74 U.S. 454, 458-59 (1868). See also United States v. San Jacinto Tin Co., 125 U.S. 273, 279 (1888); The Gray Jacket, 72 U.S. 370 (1866).

Moreover, it is only a matter of common sense that, having provided the Attorney General with plenary authority over the government's litigation, 28 U.S.C. §516, Congress would wish such litigation to be within the sole province of the Attorney General. No authority over the government's litigation is possible if other agencies may institute litigation on their own, or if the Attorney General must be subject to agreements with such agencies which infringe on his authority over litigation.

The plenary authority and supervision of the Attorney General is as necessary in VRR litigation as in other cases even though the Attorney General represents not the United States but, rather, a private person, the service member. In addition to the redress of individual rights, VRR litigation also creates precedents which affect the United States and its national security. The reserve and armed forces of the United States are becoming ever more important to the defense of our nation as is shown clearly by recent events in the Persian Gulf. Thus, a centralized control over VRR litigation, and its supervision by experienced litigators who can balance important policy interests, is just as important as in cases where the Attorney General directly represents the United States.

We should also note that retaining control of VRR litigation in the Department of Justice also fosters a much needed objectivity in making litigation decisions. Under current legislation, and under the proposed Draft Bill, the investigation, preparation, and assertion of the service member's claim is largely done by the Department of Labor, whereas the Department of Justice represents returning servicepersons in court.

Section 2044(d) of the Draft Bill provides that, if a private employer fails to comply with the provisions of the bill, a "United States attorney or comparable official" may file a pleading on behalf of the veteran. While, of course, the United States Attorneys are under the supervision and control of the

Attorney General, and will, in most cases, directly handle VRR litigation, there may be instances where the Attorney General would wish to designate some other official to represent a service member in VRR litigation. Thus, this section should be modified to provide that the Attorney General is the official authorized to represent the service member in a VRR case.

In the Draft Bill, Section 2044(d) provides that, if an employer is found to have failed or refused to comply with any provision of the bill, a civil penalty up to $25,000 for each failure or refusal shall be assessed against the employer. Such a penalty would be a substantial change in existing VRR legislation, which provides for reinstatement, lost salary and benefits. While the threat of such a penalty may make compliance somewhat more likely, we believe that it would make the job of the Department of Labor to settle and resolve VRR cases before litigation, as well as the Department of Justice's job of settlement and resolution of VRR cases in litigation, much more difficult since an employer would be forced, in many cases, to litigate rather than accept imposition of such a large mandatory penalty.

Section 2043 of the Draft Bill gives jurisdiction to the Merit Systems Protection Board ("MSPB") to resolve disputes between the veteran and his employing agency where the veteran is a federal employee. Although the Administration's bill provides a new chapter 92 of Title 5, United States Code, no such chapter is appended to the Draft Bill. We urge the Subcommittee to treat

such disputes as provided in the Administration's bill. We believe that a 25-day deadline for appeals to the MSPB should apply to VRR claims as provided in the Administration's bill. However, in an appropriate case (for example, where the reservist is overseas) the MSPB could extend the filing deadline until the reservist's return. We would oppose granting the MSPB injunctive authority to order federal agencies to comply with the VRR statute. We believe that federal employees are adequately protected by the adverse action procedures before the MSPB as well as the procedures established in the Administration's bill.

We believe that DOL representation of federal employees in VRR disputes is unwise; we urge the Subcommittee to authorize the Office of Special Counsel to represent federal employees who have VRR claims. Obviously, any such representation would have to be limited to proceedings before the MSPB and not extended to possible appeals to the Court of Appeals for the Federal Circuit.

Thank you for this opportunity to present our views.

U.S. Department of Justice

Civil Division

Office of the Assistant Attorney General

Washington, D.C. 20530

January 25, 1991

MEMORANDUM

TO: All United States Attorneys

FROM: Stuart M. Gerson
Assistant Attorney General
Civil Division

SUBJECT: Handling Claims Concerning Reemployment Rights On Behalf Of Veterans Returning From Operation Desert Storm

As you know, the Veterans' Reemployment Rights Act, 38 U.S.C. §§ 2021-26 (the Act), provides reemployment rights to veterans returning to civilian life from military service. Reservists and National Guardsmen called up for active duty, as well as regular, full-time members of the Armed Forces, are entitled to the benefits of the Act. With the current activity in the Persian Gulf, claims under the Act are sure to increase in the months ahead. We have already responded to several questions on the subject. This memorandum is simply a reminder of the provisions of the Act and the procedures used to implement it.

Section 2022 of title 38 confers upon the district courts jurisdiction over the claims of veterans arising under the Act and grants the courts enforcement powers. In addition, section 2022 requires that United States Attorneys furnish representation to veterans claiming entitlement to the benefits of the Act in those instances in which the United States Attorney is "reasonably satisfied" that the veteran applying for assistance is entitled to such benefits. 38 U.S.C. § 2022.

Normally, such cases are referred to you through the Civil Division's Commercial Litigation Branch. Under current practice, the Veterans Employment and Training Service ("VETS"), Department of Labor ("DOL"), initially investigates complaints by veterans against employers and attempts to resolve them amicably. See 38 U.S.C. § 2025. If VETS determines that a veteran's complaint is meritorious, it seeks through informal means to secure the veteran's rights by obtaining the employer's voluntary compliance with the law. VETS resolves over 95 percent of these complaints without the need for litigation.

In the small number of instances in which it cannot resolve a veteran's complaint, VETS refers the case, through the

appropriate DOL Regional Solicitor, to the Commercial Litigation Branch with a recommendation that representation be granted by the United States Attorney. The Commercial Litigation Branch then reviews DOL's investigative file and recommendation and, if it concurs with DOL's recommendation, forwards the case to the appropriate United States Attorney for handling in accordance with 38 U.S.C. § 2022.

As previously stated, in view of Operation Desert Storm, we anticipate that the number of veterans' reemployment rights complaints will increase significantly. Should you receive any complaints directly from returning veterans, please refer them to the nearest Regional VETS Office, so that such complaints may be processed administratively by DOL.

If representation is required, the veteran's claim should be accorded expedited treatment and the complaint, if necessary, should be filed at the earliest practicable date. See United States Attorney's Manual, § 4-14.100.

For further general information, please refer to section 4-14.100 of the United States Attorney's Manual; section 3-31 of the Civil Division Practice Manual; and DOL's Veterans' Reemployment Rights Handbook (1986 ed.). If you need copies of any of these publications, please let us know. Any inquiries that may arise concerning individual cases may be directed to Richard P. Nockett (FTS 367-1134) or John W. Showalter (FTS 367-0244) at the Commercial Litigation Branch.

Thank you.

STATEMENT OF
HONORABLE BILL R. PHILLIPS
DEPUTY DIRECTOR, OFFICE OF PERSONNEL MANAGEMENT

before the

SUBCOMMITTEE ON EDUCATION, TRAINING,
AND EMPLOYMENT
COMMITTEE ON VETERANS' AFFAIRS
U.S. HOUSE OF REPRESENTATIVES

at a hearing on

VETERANS' REEMPLOYMENT RIGHTS

MARCH 7, 1991

MR. CHAIRMAN AND MEMBERS OF THE SUBCOMMITTEE:

THANK YOU FOR INVITING ME TO JOIN YOU TODAY TO DISCUSS DRAFT LEGISLATION ENTITLED THE "VETERANS REEMPLOYMENT RIGHTS AMENDMENTS OF 1991."

THIS PROPOSAL WOULD REVISE AND RESTRUCTURE THE 50-YEAR-OLD VETERANS' REEMPLOYMENT RIGHTS (VRR) LAW. IT WOULD ESTABLISH UNIFORM DEFINITIONS OF RIGHTS AND BENEFITS, SIMPLIFY THE DETERMINATION OF ELIGIBILITY AND ENTITLEMENTS, AND CLARIFY AND IMPROVE PROCEDURES FOR ENSURING TIMELY COMPLIANCE WITH THE LAW.

THE DEPARTMENT OF LABOR HAS RECENTLY TRANSMITTED TO CONGRESS A LEGISLATIVE PROPOSAL WITH SIMILAR PURPOSES. ACCORDINGLY, I WILL DEFER TO DOL FOR AN ANALYSIS OF THE DETAILS OF, AND DIFFERENCES BETWEEN, THE TWO PROPOSALS. IT IS CLEAR, THOUGH, THAT TODAY'S U.S. MILITARY STRATEGY ASSIGNS A MAJOR ROLE IN OUR NATIONAL MILITARY PREPAREDNESS TO RESERVE COMPONENTS. THESE RESERVISTS MUST BE READY TO INTERRUPT THEIR PRIVATE LIVES AT ANYTIME, AND THE POLICY IS HEAVILY DEPENDENT UPON THE COOPERATION AND SUPPORT OF CIVILIAN EMPLOYERS. OPM STRONGLY SUPPORTS EFFORTS TO MAKE THE STATUTORY EMPLOYMENT PROTECTIONS FOR VETERANS AND RESERVISTS STRONGER AND CLEARER.

THE FEDERAL GOVERNMENT AS AN EMPLOYER HAS A STRONG TRADITION OF PROVIDING MODEL TREATMENT TO EMPLOYEES WHOSE FEDERAL CIVILIAN SERVICE IS INTERRUPTED BY MILITARY SERVICE, INCLUDING ACTIVE DUTY FOR TRAINING AND INACTIVE DUTY TRAINING BY MEMBERS OF THE RESERVES OR THE NATIONAL GUARD. BY LAW, SUCH EMPLOYEES ARE ENTITLED TO BE REEMPLOYED IN THE POSITION THEY LEFT, OR AN EQUIVALENT POSITION IN THE AGENCY. AND, THEY RETAIN ALL THE RIGHTS AND BENEFITS WHEN THEY RETURN THAT THEY WOULD HAVE HAD IF THEY HAD NEVER LEFT, INCLUDING CONSIDERATION FOR CAREER PROMOTIONS DURING THEIR ABSENCE. AND, OF COURSE, THERE CAN BE NO DISCRIMINATION AGAINST THESE EMPLOYEES EITHER IN INITIAL HIRING DECISIONS OR IN ANY LATER TREATMENT THEY RECEIVE.

TO ENSURE THAT THESE RIGHTS ARE PROVIDED, TITLE 5 OF THE UNITED STATES CODE ASSIGNS TO THE MERIT SYSTEMS PROTECTION BOARD (MSPB) THE RESPONSIBILITIES OF THE FORMER CIVIL SERVICE COMMISSION TO HEAR ANY APPEALS ARISING FROM EMPLOYEES WHO FEEL THAT THEY HAVE NOT RECEIVED ANY OF THE RIGHTS PROVIDED UNDER THE VETERANS' REEMPLOYMENT LAWS IN TITLE 38. OPM ITSELF HANDLES ONLY CASES WHERE CERTAIN RARE CIRCUMSTANCES MAKE IT NECESSARY TO PLACE A RETURNING VETERAN IN SOME AGENCY OTHER THAN THE ONE THAT ORIGINALLY EMPLOYED THE VETERAN.

WHILE OPM DOES NOT ORDINARILY HAVE ANY INVOLVEMENT IN MSPB'S HANDLING OF VETERANS' REEMPLOYMENT APPEALS FROM FEDERAL EMPLOYEES, WE UNDERSTAND THAT VERY FEW CASES ARISE. THIS IS QUITE SIGNIFICANT, GIVEN THE FACT THAT FEDERAL EMPLOYEES MAKE

UP A VERY LARGE PORTION OF THE RESERVES--AN ESTIMATED 10 PERCENT. THE USE OF MSPB TO ADJUDICATE FEDERAL REEMPLOYMENT CASES HELPS GET THESE CASES SETTLED QUICKLY, SINCE THEY DON'T HAVE TO GO THROUGH THE COURT SYSTEM, AS IS THE PROCESS FOR PRIVATE SECTOR CASES.

WE ARE PLEASED TO NOTE THAT MOST VRR APPEAL CASES INVOLVING FEDERAL EMPLOYEES ARE MORE OFTEN DUE TO MISUNDERSTANDING RATHER THAN MALICE.

IN ORDER TO BETTER ASSIST FEDERAL AGENCIES WITH THEIR OBLIGATIONS TO EMPLOYEES RETURNING FROM MILITARY DUTY, OVER THE PAST THREE YEARS OPM HAS EXTENSIVELY REVISED GUIDANCE IN THIS AREA.

WE BEGAN WITH A COMPLETE REVISION OF OUR REGULATIONS. THE REGULATIONS, WHICH TOOK EFFECT ON JANUARY 14, 1988, ARE CLEARER AND HAVE ALLEVIATED CONFUSION ABOUT THE RIGHTS OF EMPLOYEES RETURNING FROM MILITARY SERVICE.

WE ALSO COMPLETELY UPDATED OUR FEDERAL PERSONNEL MANUAL CHAPTER ON RESTORATION TO DUTY IN JUNE 1988 AND FURTHER REVISED IT IN MARCH 1990. THE FEDERAL PERSONNEL MANUAL IS OUR BASIC FORM OF GUIDANCE FOR OPERATING PERSONNEL OFFICES THROUGHOUT THE GOVERNMENT, SO THIS GUIDANCE DIRECTLY ASSISTS THE PEOPLE WHO PROCESS INDIVIDUAL PERSONNEL ACTIONS TO UNDERSTAND THEIR OBLIGATIONS TO RETURNING VETERANS AND RESERVISTS.

FINALLY, WE ISSUED A NEW PAMPHLET FOR EMPLOYEES WHO PERFORM MILITARY DUTY, TO MAKE SURE THEY UNDERSTAND THEIR RESTORATION RIGHTS AND HOW TO EXERCISE THEM.

IN RESPONSE TO THE MASSIVE DEPLOYMENT OF RESERVISTS TO THE PERSIAN GULF SINCE AUGUST 1990, AND THE SUDDEN DISRUPTION IN THE LIVES OF MANY FEDERAL EMPLOYEES AND THEIR FAMILIES, OPM HAS FURTHER INCREASED OUR COMMITMENT TO ENSURING THAT THE FEDERAL GOVERNMENT FUNCTIONS AS A MODEL EMPLOYER WITH RESPECT TO VETERANS' EMPLOYMENT PROTECTIONS. THIS COMMITMENT GOES BEYOND THE USUAL REQUIREMENTS OF VRR LAW IN SEVERAL RESPECTS. FOLLOWING THE PRESIDENT'S DECISION ON AUGUST 22, 1990, TO CALL CERTAIN MEMBERS OF THE ARMED FORCES RESERVES TO ACTIVE DUTY, OPM ISSUED A GOVERNMENTWIDE MEMORANDUM TO REMIND AGENCIES OF THEIR VRR OBLIGATIONS AND URGE THEM TO MAKE CERTAIN THAT AFFECTED EMPLOYEES LEAVE THEIR EMPLOYMENT WITH FULL KNOWLEDGE OF THEIR EMPLOYMENT PROTECTIONS.

OPM FURTHER URGED AGENCIES, IN VIEW OF THE UNCERTAIN DURATION OF OPERATION DESERT SHIELD: (1) TO RETAIN ABSENT RESERVISTS IN THEIR POSITIONS ON THE AGENCY ROLLS, EITHER ON PAID MILITARY LEAVE OR IN A LEAVE WITHOUT PAY STATUS, IN ORDER TO GUARANTEE THAT THEY RETURN TO THE SAME POSITIONS THEY LEFT AND TO PRESERVE GROUP INSURANCE ELIGIBILITY FOR UP TO THE FULL YEAR PERMITTED BY CURRENT LAW; AND (2) TO MAKE COUNSELLING THROUGH AGENCY EMPLOYEE ASSISTANCE PROGRAMS AVAILABLE TO FAMILY MEMBERS OF ACTIVATED RESERVISTS.

IN LATE AUGUST, WHEN BUDGET SEQUESTRATION CONCERNS WERE FORCING MANY AGENCIES TO PLAN FOR EMPLOYEE FURLOUGHS, OPM ENCOURAGED AGENCIES TO MAKE EXCEPTIONS FROM FURLOUGHS FOR ANY CIVILIAN EMPLOYEE CALLED TO ACTIVE MILITARY DUTY DURING THE CRISIS IN THE MIDDLE EAST SO THOSE INDIVIDUALS WOULD BE ASSURED OF RETURNING TO THEIR FORMER POSITIONS AND WOULD BE ABLE TO USE ANY PAID LEAVE TO WHICH THEY WERE ENTITLED IN THE MEANTIME.

ON SEPTEMBER 25, 1990, OPM ISSUED INTERIM REGULATIONS THAT WAIVE THE EMPLOYEE SHARE OF FEDERAL EMPLOYEES HEALTH BENEFITS PREMIUMS FOR EMPLOYEES WHILE THEY ARE ON MILITARY DUTY COMMENCING ON OR AFTER AUGUST 22, 1990, AND ARE SERVING IN SUPPORT OF OPERATION DESERT SHIELD AND DESERT STORM.

GIVEN THE LARGE NUMBERS OF FEDERAL EMPLOYEES WHO HAVE BEEN CALLED TO ACTIVE DUTY IN THE CURRENT PERSIAN GULF EMERGENCY AND THE FACT THAT MANY HOLD KEY POSITIONS IN THEIR AGENCIES, OUR EFFORTS TO ASSURE MAXIMUM PROTECTION OF THEIR EMPLOYMENT RIGHTS AND BENEFITS HAVE REQUIRED CONSIDERABLE CREATIVE PROBLEM-SOLVING ON THE PART OF AGENCIES IN CONTINUING TO CARRY OUT THEIR RESPONSIBILITIES. HOWEVER, WE BELIEVE THAT OUR CITIZEN/SOLDIERS WHO HAVE SERVED TO PRESERVE FREEDOM IN THE PERSIAN GULF DESERVE NO LESS.

I WOULD BE GLAD TO RESPOND TO ANY QUESTIONS YOU HAVE AT THIS TIME.

STATEMENT BY

RADM PHILIP W. SMITH, USNR (RET)

DIRECTOR OF LEGISLATION

OF THE

NAVAL RESERVE ASSOCIATION

TO THE

SUBCOMMITTEE ON EDUCATION, TRAINING AND EMPLOYMENT

OF THE

HOUSE COMMITTEE ON VETERANS' AFFAIRS

7 MARCH 1991

RADM Philip W. Smith, USNR (Ret)

Rear Admiral Philip W. Smith, a native of Mt. Carmel, Illinois, attended the Universities of Eastern Illinois, Kansas City and Miami obtaining an LLB and J.D. Degree. He began his Naval career in 1942 as an aviation cadet and was commissioned Ensign in 1944, he advanced through the ranks and was promoted to Rear Admiral September 1977. He has been a Transport Plane Commander in the C-54 and C-118, Patrol Plane Commander in the PBY and PB4Y. He served as Commanding Officer of VR-742, VR-50, VR-54, and Director Naval Air Logistics Office. As a flag officer he served as DCOS, Deputy COMNAVAIRLANT and as Commander Antilles Defense Command.

Admiral Smith served as assistant Federal Maritime Commissioner from January 1982 to February 1987, and is currently Director of Legislation for the Naval Reserve Association. Previously he was an attorney with a financial and property practice in Miami, Florida, and an airline captain with Delta Air Lines, where he flew DC-8 and DC-10 aircraft. RADM Smith was the National President of the Naval Reserve Association in 1979 thru 1981. During World War II he served in the Pacific Campaign, Mariannas and Iwo Jima with VPB-116; Korean conflict, Pacific and Far East, in air transport operations with VR-5; Vietnam and Southeast Asia in C-118's with VR-743 in 1965 and 1966.

He was the pilot of the 1952/53 Bob Hope Christmas Show to Alaska and the Far East. RADM Smith has been awarded the Meritorious Service Medal and Meritorious Unit Commendation. His campaign and service medals are: American and Pacific Theatre, Navy Expeditionary Medal, Victory Medal WW II, and the Occupation, National Service, Naval Reserve, Armed Service, Korean Service and United Nations Medal.

REV. 3/1/91

Mr. Chairman, distinguished members of the Committee, it is indeed a privilege to have this opportunity to present the views of the Naval Reserve Association to the Committee for your consideration.

The current Veterans' Reemployment Rights statute needs clarifying because the law is difficult to understand and administer, which leads to job loss and delays in reemployment.

This hearing is particularly timely since the Department of Defense has recently activated over 220,000 reservists and members of the National Guard to support Operation Desert Shield/Desert Storm, including over 60,000 who are serving in the Persian Gulf. Over 20,000 Naval Reservists have answered the call, with a substantial number being medical professionals serving in Navy Field Hospitals supporting the combat Marines in theatre. Additionally, the Interagency Task Force, just a week ago, completed and forwarded to Congress their long awaited revised VRR law entitled "Uniformed Services Employment Rights Act." This proposed Act is similar to the Committee's draft VRR Act in most respects. Both drafts continue the substantive rights of the VRR law and make it more easily understood and enforced. In lieu of a section by section examination of the law and the draft proposals, NRA will identify some of the salient differences with our recommendations.

The unnecessary distinctions between types of military training and service have been eliminated in both draft acts, and the veterans' entitlements and eligibility criteria are based on time in service rather than categories of

service. This greatly simplifies the Act and promotes better understanding and enforcement.

The current VRR law lacks subpoena authority to assist and speed up the investigative process by the Department of Labor. Both draft acts now contain this subpoena authority which has long been needed to assist the investigations on behalf of the veteran/reservist.

When reservists ask their employer for time off to attend military training or active duty and the employer says no, threatening to fire the reservists if they comply with their military orders, the reservists should not be required to report for military duty on the bet that they will win their VRR case after they return from duty. Declaratory or injunctive relief should be available to the reservist in such a situation, before they leave their job for military service. The Committee draft proposal provides for such injunctive/declaratory relief while the Task Force proposed Act does not. In the view of the Naval Reserve Association, injunctive relief is a very important feature for protection of the veteran/reservist.

The Naval Reserve Association recommends that the Department of Labor have the authority to investigate VRR cases, and also have the authority to provide legal representation to the VRR claimants. Concentrating the authority and responsibility in the Labor Department provides for more consistent accountability. The Committee draft gives this combined authority to the Department of Labor while the Task Force draft grants the investigative authority to the

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Department of Labor and vests legal representation with the Attorney General.

From our membership there have been some reports of delays in the investigative process by the Department of Labor, reportedly as a result of a limited number of investigators. Also, District Attorneys and their staffs have heavy case loads of major drug cases, etc. so that a few hundred or even a few thousand dollars in back pay for a reservist may not be considered a very high priority case. Hence, resort to private counsel may become an imperative in some instances to enforce rights under the VRR law. A majority of the veteran/reservist claimants are middle or lower income persons with limited means to pay legal and investigative fees, and the sums normally involved are often not attractive for contingent fee arrangements. Therefore, the Naval Reserve Association would suggest that VRR cases be considered for inclusion in those categories of actions entitled to the attorney fee provisions of the Civil Rights Attorney Fees Act.

The new time periods in both drafts, i.e. the time to report for work after military duty and the time employment is protected, appears adequate to protect the affected veteran/reservist. If the military service is in excess of 181 days the reporting time is 90 days after military service and the job is protected for one year, 14 days to report and six months protection for service of 31 days but fewer than 181 days, and at the beginning of the 1st regularly scheduled working period for reporting and three months protection if the length of military service was less than 31 days. There is a possibility that the three month job protection for the Reservist's annual two (2) week training duty

or summer camp might prove to be inadequate. In any event, the new proposals based on length of service are much less complicated and should be more easily understood and enforced.

Historically, a disproportionate number of complaints have been filed by Guard/Reserve personnel who are Federal employees. The federal government should be a model employer with respect to "employer support of the Guard and Reserve" and set an example for the private employer. While both draft acts have improved the enforcement procedures for Federal employees, the Task Force draft provides for representation of the Federal employee by the Office of the Special Counsel in appeals to the Merit Systems Protection Board. The Committee draft only provides for an appeal to the Merit System Protection Board without a provision for representation.

Both drafts have adequate and similar provisions preserving insurance, pension and fringe benefits for the returning veteran/reservist.

The Committee draft law provides for a civil penalty of $25,000 for an employer who fails or refuses to comply with the provisions of the Act. This enforcement mechanism should be studied for its possible negative effect on the hiring of reservists/guardsmen.

These two draft acts amending Title 38 United States Code, Chapter 43 are evidence of the progress made in providing job protection for our reservists following the Hearings held by this Committee in 1988. Thank you for your

continued attention to this serious problem for Reserve Component readiness and thank you for giving me the opportunity to testify here today.

If you have any questions, I will be happy to try to answer them.

PWS/kac:sc

STATEMENT OF

MICHAEL P. CLINE

MASTER SERGEANT

OHIO ARMY NATIONAL GUARD

EXECUTIVE DIRECTOR

ENLISTED ASSOCIATION OF THE NATIONAL GUARD

OF THE UNITED STATES

BEFORE THE

VETERAN'S AFFAIRS SUBCOMMITTEE

ON EDUCATION, TRAINING AND EMPLOYMENT

MARCH 7, 1991

MR. CHAIRMAN AND MEMBERS OF THE SUBCOMMITTEE:

Thank you for this opportunity to present to this distinguished Subcommittee the views of the Enlisted Association of the National Guard of the United States with respect to the amendments to title 38, United States Code, regarding veterans reemployment rights.

This particular act is of special interest to me. As the Executive Director of EANGUS, I'm here to testify on the behalf of all enlisted members of the National Guard, as well as both my wife and myself who are both Active National Guard members. I am personally interested in the provisions that we would be afforded under these amendments if we were called to active duty.

OVERVIEW OF THE PROPOSED AMENDMENTS

Two main reasons for the proposed amendments include:

1. To support non-career service in the uniformed services by minimizing any disadvantages that would occur because of such service.

2. To minimize any disruption of life to persons involved in such service. The basic principle of the "Veterans Reemployment Rights Amendments Act of 1991" is to insure that no member of the Armed Services will be discriminated against in regard to: employment, reemployment, or continuation of employment because of being called to active duty service. Under this act, employers are forbidden to deny any form of reemployment if active duty military service was a "motivating factor" in making his (her) decision, unless that employer can prove that reemployment would have been denied for other reasons.

OPINIONS OF OUR ASSOCIATION CONCERNING THE AMENDMENTS

We at EANGUS would like to recognize the efforts made to amend title 38, Chapter 43 of the U.S. Code. Approximately 556,000 National Guard members are prepared to defend our nation. More

than 492,000 are enlisted members and these amendments could not have been more timely than they are right now. Specifically, the number of Army and Air National units and Guard members called to active duty for Desert Storm are as follows: 343 units of the Army National Guard comprised of 56,538 enlisted soldiers; 74 units of the Air National Guard comprised of 4,826 enlisted airmen. Additionally, thousands of other Guard members are serving in various capacities around the world in support of Desert Storm. Our Association is concerned not just for the 492,000 enlisted members of the National Guard, but for all of the troops that will be directly affected by your action on the proposed legislation.

Our Association is committed to further the quality of life of enlisted members of the National Guard. We must ensure that the lives of the servicemen and women who were called to Saudi Arabia to serve in Operation Desert Storm get back to normal as soon as they return home. We give our full support to the amendments proposed in the draft bill and will continue to support legislation that will help to better the lives of our Nation's fighting forces.

TOPICS FOR FURTHER ENHANCEMENT OF THE AMENDMENTS

Although we support the majority of the specifics of the amendments proposed, we would like to point out some areas that are of concern to us. The paragraph on enforcement of the statute merits further scrutiny. The proposed legislation states that the violating employer only has to reemploy a complainant and return an estimation of wages and benefits lost during the time of nonemployment. The employer is also subject to injunctions and restraining orders by local authorities and may be fined up to $25,000 per offense. We would like to see stiffer penalties imposed on violating employers. A mandatory fine for every offense and raising the amount of that fine from $25,000 to $50,000 per offense would encourage employers to comply with the Act.

We would like to see companies that are complying with the statute be rewarded in some way. Tax breaks for such companies would not only offer a great incentive for companies to comply freely with the Statute, but would also help to promote the hiring of more military related employees, which is a stated purpose of this document. Reemployment rights need to protect both the employer and employee, but most of all these rights need to be in the best interest of our nations defense.

Other questions being posed to you are:

1. What happens to Guard members or Reservists who return home to find that his or her company has been sold to or merged with another company? We believe that the company owner has a responsibility to inform the new owner of any persons that would require reemployment under this act.

2. What happens to those individuals who work for a company under a "personal services contract"? We want the employer to reinstate the employee in his/her position, if the contracted position still exists.

3. We wish for the amendment to further clarify the meaning of the statement "unless such employer's circumstances have so changed as to make reemployment impossible or unreasonable;" sec.2032.(a).(1). pg.9. We feel this statement is too vague and gives the employer a wide range of situations in which he can define his reasons for not reemploying someone that would be affected by this Statute. Clarification of this statement would benefit both the employer and employee.

CLOSING STATEMENTS

The National Guard and Reserve Components of the United States Armed Forces are a vital part of our Nation's fighting force. These brave men and women willingly volunteer to serve in the

military, understanding fully that they may be called upon to fight for their country. The people of the United States should feel an obligation to ensure that these servicemen and women are taken care of when they return home from active duty.

More than 354 years ago our forefathers laid down their plows and went off to fight for what is now the greatest nation in the world. When the need for their services were complete, they returned to their land and resumed life as before. Shouldn't our Guard members of today enjoy this the same privilege?

Thank you for your time and patience. This concludes my statement. I will happy to take any questions at this time.

STATEMENT BY

CHARLES G. SCHREIBER

DIRECTOR, LEGISLATIVE ACTIVITIES

of the

NATIONAL GUARD ASSOCIATION OF THE UNITED STATES

to the

Education, Training and Employment Subcommittee

of the

House Committee on Veterans' Affairs

7 March 1991

INTRODUCTION

Operation DESERT SHIELD/DESERT STORM in the Persian Gulf has demonstrated once again the importance of the citizen-soldier to the defense of this nation. Further, it has validated that the Total Force Policy is a cost-effective way to maintain the required force structure to achieve military deterrence. The integral role of the National Guard in the Total Force and its capability to mobilize and deploy to meet the threat are clear.

While the current call-up is unprecedented in recent history, regional contingencies are expected to be the major military threat for the foreseeable future. That will mean maintaining the capability to rapidly deploy forces to almost any part of the world. Budget reality precludes having a large standing military with unlimited resources. Therefore, we anticipate that the National Guard will continue to play a significant role in defense.

Without employer support and the assurance of continued employment, the National Guard and Reserve would be unable to sustain a viable force. The impact of increased amounts of time away from civilian employment needed to meet required levels of training and to maintain unit and individual readiness was apparent long before DESERT SHIELD/DESERT STORM. However, the collective and national impacts of the loss of members of the Guard from their communities and from business and industry has just recently become a stark reality.

The consensus of our members for some time has been that employer support and secure reemployment rights are essential to maintaining a viable National Guard and Reserve. Employer pressure and spouse pressure have often been cited by Guard members as the leading reasons for leaving National Guard service. The proposed legislation could have a positive affect on retention of those members of the Guard and Reserve now serving on active duty.

EMPLOYER ACTIONS

We are convinced that employers recognize the benefits they receive from the added quality of Guard experience. Overall, employers are supportive of the demands of military service. Even so, the generosity of employers since the beginning of Operation DESERT SHIELD has been nothing short of overwhelming.

A significant number of employers have initiated programs that provide Guard and Reserve personnel and their families with continuing benefits. Many have implemented or enhanced existing policies in order to offset the loss of civilian pay.

At the same time, these employers are also trying to cope with the obvious hardships that the losses to the work force have created. In the short run, most employers can improvise. It is the long-run and the future that are best served by legislative protections for the employee and the employer.

VETERANS REEMPLOYMENT RIGHTS LEGISLATION

The bill that is under consideration by this committee is quite comprehensive. It starts out with an issue that is frequently discussed - discrimination in hiring and personnel actions. There is a strong perception that discrimination is prevalent, although subtle. We recognize that protection from discrimination is difficult to legislate. Employment

decisions are frequently made by discerning between equals. This bill will make it even more clear that present or future service in the military, particularly National Guard and Reserve participation, may not be used as a negative distinction in employment decisions. To maintain a quality force, the National Guard must recruit from the same pool of talented leaders and skilled workers that are so attractive to employers. It is important that we work together rather than in competition.

A second important aspect of this bill is the specific time criteria for application for reemployment after release from active duty and for the protection from dismissal for other than cause for a designated period of time. It is important and appropriate that these guidelines be geared to length of service.

The bill is a reasonable balance of the needs of the employee and the employers It protects the employer's interests by limiting the amount of service an employer is required to approve to 90 days in 12 months with an exception for duty that is certified by a military authority as essential. In addition, employees are required to give their employer advanced written or oral notice of duty to be performed, unless impossible or unreasonable. The cost of medical care is certainly a major concern for most American families. The transition between military medical care and civilian care is a disruptive one for families that are already under stress, even in peacetime training situations. The assurance that health insurance will be continued as if the individual was on furlough or leave of absence and that no exclusion or waiting periods will be incurred for conditions that arose before or during the period of service focuses on an issue of major concern during DESERT SHIELD/DESERT STORM.

Finally, the bill is structured to provide equitable enforcement which is key to the successful implementation and adherence to this program.

An Administration proposal on veterans reemployment rights is in the process of being cleared through the necessary departments. There are some differences in the provisions of that proposal and the bill before this committee. A comparison of the two would ensure that all the considerations have been reviewed prior to action.

CONCLUSION

The military operations generated by the Persian Gulf crisis have served to draw attention to a number of statutes that need revision. We applaud the actions of this committee to react quickly to update legislation on veterans reemployment rights. Passage of an enhanced veterans' reemployment rights bill will assist in the transition of over 200,000 Guard and Reserve personnel returning from DESERT SHIELD/DESERT STORM. Those citizen-soldiers have again come to the aid of their country and they deserve every consideration in paving the way for their return to their civilian employment.

Statement of Major General Evan L. Hultman, AUS (Ret.), Executive Director, Reserve Officers Association of the United States before the Subcommittee on Education, Training and Employment of the House Veterans Affairs Committee regarding Veterans' Reemployment Rights --7 March 1991.

Mr. Chairman and Members of the Committee:

On behalf of the 115,000 Reserve Officers Association members from each of the uniformed services, I appreciate the opportunity to present to the committee the association's views on the proposed revisions to Veterans' Reemployment Rights legislation.

First, I want to commend the subcommittee for responding to the needs of Reservists who have been called to active duty and who are now concerned as to whether or not their jobs will be waiting for them when they are released from active duty. Reemployment rights, or the ability of an individual Reservist to continue his or her employment with a civilian or governmental employer, are critical to retention in the reserve components and thereby are essential to the success of the Total Force. But before focusing on the needs of Reservists and the adequacies of the law, I would like to comment briefly on the call-up of members of the reserve components in support of Operations DESERT SHIELD and DESERT STORM.

The Army has called up approximately 71,200 members of the Army Reserve's Troop Program Units; more than 1,200 members of the Individual Mobilization Augmentation (IMA) Program; more than 20,000 Individual Ready Reservists; and about 1,150 retirees. In addition, more than 4,000 Army Reservists served or are serving on voluntary temporary tours of active duty. The Army Reserve's share of the Army Reserve Component call-up is over 600 units, and more than 44,000 Army Reservists are serving in theater. Note, that under Department of the Army policy, every deploying unit was certified combat ready prior to leaving the United States. Because of their high state of readiness, many of these units spent only the minimum seven days to process for overseas duty.

The Chief of Naval Operations called up approximately 25,000 of the 44,000 Naval Reservist authorized for call-up by the Secretary of Defense. Over one half of those called are medical personnel. Over 20,000 Naval Reservists are now on active duty, including more than 6,500 who are now serving in the theater of operations. The Secretary of Defense authorized the call-up of 44,000 Marine Corps Reservist. More than 25,000 Marine Corps Selected Reservists, approximately six of every ten Marines in the Selected Reserve, have been called up and are now serving in Southwest Asia. In addition, more than 7,000 Marine Corps Individual Ready Reservists have been called to active duty.

The Air Force Reserve provided more than 130 complete or partial units totaling more than 20,000 personnel for Operation DESERT STORM. The first units to be called up augmented the Military Airlift Command's strategic lift capability, while following units provided tactical airlift, aerial port squadrons, combat logistics and fire fighters. Forty-one different medical units were called up. No additional training was required to bring personnel "up-to-speed" prior to deployment, and Reservists were indistinguishable from their active force counterparts. In addition, more than 2,000 Individual Mobilization Augmentees were called to active duty.

The Coast Guard Reserve has provided port security and load supervision since the earliest phase of the logistic effort to support Operation DESERT SHIELD/DESERT STORM. All three of the Reserve Port Securtiy Units structured for overseas operation were deployed in theater.

Reserve forces involvement in Operation DESERT STORM confirms the critical importance of reserve components as integral parts of the Total Force--Reservists have every reason to be proud of their contribution. It also suggests that there will be a great many Reservists needing reemployment following their release from active duty. It has to be assumed that, unless these Reservists have jobs to return to, many will opt out of the Guard and Reserve. Related to a basic right of reemployment are protections for seniority, status, and the employee's pay rate that could be affected by a call-up. Reservists routinely make sacrifices as a part of their service, and left without strong employment and reemployment protection, few would be able to continue to serve.

The importance of employment protection is reflected in the great number of calls ROA received from Reservists who were ordered to active duty and from Reservists who anticipated being activated. Reservists had a lot of questions relating to the call-up, but many of their questions related specifically to reemployment rights. Calling the association were also employers, the press, and many personnel consulting firms who had questions regarding the law.

Statutory employment or reemployment protection is crucial to the ability of the reserve components to attract and retain qualified personnel. Having stated what may seem to be obvious, I would caution the committee that the law or any changes to the law must be clear and unambiguous. In order to protect the rights of the Reservist--and the rights of the employer--the statues must be easily interpreted and understood.

Having said that clear and unambiguous statutory employment protection is needed, I would also caution that legislation has its limits. It would be unwise and impractical to try to anticipate every circumstance and provide a legislative solution in each case. Laws that go too far in protecting the rights of the employee may in the end be counterproductive. Statutory protections provide a foundation for the necessary cooperation of employers, but statues are no substitute for goodwill.

The Congress has consistently supported the view that, "The support of employers and supervisors in granting employees a leave of absence from their jobs to participate in military training without detriment to earned vacation time, promotions, and job benefits is essential to the maintenance of a strong Guard and Reserve force." Legislative initiatives should foster the enthusiastic voluntary cooperation and support from employers.

Many of the inquiries received by ROA regarding reemployment rights are redirected to the National Committee for Employer Support of the Guard and Reserve. As you know, this organization's goal is to develop and promote public understanding of the National Guard and Reserve, and it is very helpful in resolving many of the reemployment questions which arise. Because ROA does rely on the Committee to explain the details and the nuances of the law, the association does not experience the law in the same way the committee does.

My testimony is made more difficult by the fact that there does not seem to be available a sectional analysis to permit a comparison between the discussion draft bill which would amend Chapter 43, title 38, United States Code and current law, nor is there any accompanying statement outlining what the proposed legislation attempts to accomplish. A discussion of Veterans' Reemployment Rights is additionally made more difficult by the knowledge that there in another legislative proposal which the Administration has yet to make available for consideration. However, there are a number of areas of concern that I would address.

First, ROA is concerned that there is no one agency responsible for the administration and enforcement of reemployment laws. The responsibility for reemployment rights of federal workers is

particularly lacking. The division of responsibilities often frustrates and delays compliance and the resolution of infractions of the law. It further makes it very difficult to fix responsibility for enforcement. This problem has been identified in the past but it continues to be a concern.

Second, current law provides different time periods given to an employee to report to an employer for reemployment following military service. The different time periods are governed by the type of call-up or duty and not by the length of service, per se. The type of call-up of duty performed is not important to the employer, but the length of service is important and should be the only governing factor. The discussion draft bill appears to correct this deficiency.

Third, the discussion draft bill, in amending subchapter II, paragraph 2034, addresses differing periods of time during which a person who is reemployed by an employer cannot be discharged from employment, except for cause. While the proposed change may appear to provide additional protection, by providing statutory periods of one year, 6 months, and 3 months, the proposal implies clearly that after these time periods an employer is free to discharge the individual following active duty service in the uniformed services. The implication may actually cause employers to discharge more personnel who are participating in reserve programs at the end of the statutory periods and thus affectively reduce protection rather than add to it. The discharge provisions seem to be in contradiction to the broad statement prohibiting discrimination against members of the uniformed services and acts of reprisal, provided in subchapter II, paragraph 2031.

ROA applauds the efforts made in the dicussion draft bill to clarify terminology and to simplify some provisions. The use of "uniformed services" and by defining it to include the "United States Army, Navy, Air Force, Marine Corps, and Coast Guard, including the reserve components", clearly brings all of the services and their reserve components under the protection of the law. This is a needed clarification.

Thank you for the opportunity to present ROA's views on Veterans' Reemployment Rights legislation and the proposed changes thereto. The subcommittee is to be commended for its efforts to clarify and strengthen employment protections for members of the reserve components. I will now be happy to respond to any questions that you might have.

Statement of Major General Evan L. Hultman, AUS (Ret.), Executive Director, Reserve Officers Association of the United States before the Subcommittee on Education, Training and Employment of the House Veterans Affairs Committee regarding Veterans' Reemployment Rights --7 March 1991.

Mr. Chairman and Members of the Committee:

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voluntary temporary tours of active duty. The Army Reserve's share of the Army Reserve Component call-up is over 600 units, and more than 44,000 Army Reservists are serving in theater. Note, that under Department of the Army policy, every deploying unit was certified combat ready prior to leaving the United States. Because of their high state of readiness, many of these units spent only the minimum seven days to process for overseas duty.

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indistinguishable from their active force counterparts. In addition, more than 2,000 Individual Mobilization Augmentees were called to active duty.

The Coast Guard Reserve has provided port security and load supervision since the earliest phase of the logistic effort to support Operation DESERT SHIELD/DESERT STORM. All three of the Reserve Port Securtiy Units structured for overseas operation were deployed in theater.

Reserve forces involvement in Operation DESERT STORM confirms the critical importance of reserve components as integral parts of the Total Force--Reservists have every reason to be proud of their contribution. It also suggests that there will be a great many Reservists needing reemployment following their release from active duty. It has to be assumed that, unless these Reservists have jobs to return to, many will opt out of the Guard and Reserve. Related to a basic right of reemployment are protections for seniority, status, and the employee's pay rate that could be affected by a call-up. Reservists routinely make sacrifices as a part of their service, and left without strong employment and reemployment protection, few would be able to continue to serve.

The importance of employment protection is reflected in the great number of calls ROA received from Reservists who were ordered to active duty and from Reservists who anticipated being activated. Reservists had a lot of questions relating to the call-up, but many of their questions related specifically to reemployment rights. Calling the association were also employers, the press, and many

personnel consulting firms who had questions regarding the law.

Statutory employment or reemployment protection is crucial to the ability of the reserve components to attract and retain qualified personnel. Having stated what may seem to be obvious, I would caution the committee that the law or any changes to the law must be clear and unambiguous. In order to protect the rights of the Reservist--and the rights of the employer--the statues must be easily interpreted and understood.

Having said that clear and unambiguous statutory employment protection is needed, I would also caution that legislation has its limits. It would be unwise and impractical to try to anticipate every circumstance and provide a legislative solution in each case. Laws that go too far in protecting the rights of the employee may in the end be counterproductive. Statutory protections provide a foundation for the necessary cooperation of employers, but statues are no substitute for goodwill.

The Congress has consistently supported the view that, "The support of employers and supervisors in granting employees a leave of absence from their jobs to participate in military training without detriment to earned vacation time, promotions, and job benefits is essential to the maintenance of a strong Guard and Reserve force." Legislative initiatives should foster the enthusiastic voluntary cooperation and support from employers.

Many of the inquiries received by ROA regarding reemployment rights are redirected to the National Committee for Employer

Support of the Guard and Reserve. As you know, this organization's goal is to develop and promote public understanding of the National Guard and Reserve, and it is very helpful in resolving many of the reemployment questions which arise. Because ROA does rely on the Committee to explain the details and the nuances of the law, the association does not experience the law in the same way the committee does.

My testimony is made more difficult by the fact that there does not seem to be available a sectional analysis to permit a comparison between the discussion draft bill which would amend Chapter 43, title 38, United States Code and current law, nor is there any accompanying statement outlining what the proposed legislation attempts to accomplish. A discussion of Veterans' Reemployment Rights is additionally made more difficult by the knowledge that there in another legislative proposal which the Administration has yet to make available for consideration. However, there are a number of areas of concern that I would address.

First, ROA is concerned that there is no one agency responsible for the administration and enforcement of reemployment laws. The responsibility for reemployment rights of federal workers is particularly lacking. The division of responsibilities often frustrates and delays compliance and the resolution of infractions of the law. It further makes it very difficult to fix responsibility for enforcement. This problem has been identified in the past but it continues to be a concern.

Second, current law provides different time periods given to

an employee to report to an employer for reemployment following military service. The different time periods are governed by the type of call-up or duty and not by the length of service, per se. The type of call-up of duty performed is not important to the employer, but the length of service is important and should be the only governing factor. The discussion draft bill appears to correct this deficiency.

Third, the discussion draft bill, in amending subchapter II, paragraph 2034, addresses differing periods of time during which a person who is reemployed by an employer cannot be discharged from employment, except for cause. While the proposed change may appear to provide additional protection, by providing statutory periods of one year, 6 months, and 3 months, the proposal implies clearly that after these time periods an employer is free to discharge the individual following active duty service in the uniformed services. The implication may actually cause employers to discharge more personnel who are participating in reserve programs at the end of the statutory periods and thus affectively reduce protection rather than add to it. The discharge provisions seem to be in contradiction to the broad statement prohibiting discrimination against members of the uniformed services and acts of reprisal, provided in subchapter II, paragraph 2031.

ROA applauds the efforts made in the discussion draft bill to clarify terminology and to simplify some provisions. The use of "uniformed services" and by defining it to include the "United States Army, Navy, Air Force, Marine Corps, and Coast Guard, in-

cluding the reserve components", clearly brings all of the services and their reserve components under the protection of the law. This is a needed clarification.

Thank you for the opportunity to present ROA's views on Veterans' Reemployment Rights legislation and the proposed changes thereto. The subcommittee is to be commended for its efforts to clarify and strengthen employment protections for members of the reserve components. I will now be happy to respond to any questions that you might have.

Statement of

The American Legion

1608 K STREET, N.W.
WASHINGTON, D. C. 20006

by

JAMES HUBBARD, DIRECTOR
NATIONAL ECONOMICS COMMISSION
THE AMERICAN LEGION

– before the

SUBCOMMITTEE ON EDUCATION, TRAINING AND EMPLOYMENT
COMMITTEE ON VETERANS AFFAIRS
U.S. HOUSE OF REPRESENTATIVES

on

VETERANS RE-EMPLOYMENT RIGHTS

MARCH 7, 1991

Mr. Chairman, it is with a great sense of pride that I appear before you today to express The American Legion's support for legislation which strengthens Chapter 43 of Title 38 USC. The performance of Armed Forces Reserve and National Guard units in Operations Desert Storm and Desert Shield have been absolutely superb and it is only appropriate to ensure that their jobs and careers are protected when they return home. At the same time, we must recognize that plans are still in place to reduce the size of the active duty military force significantly in the next five years. This reduction will result in our nation placing increased reliance on the National Guard and Armed Forces Reserves in the future. It is therefore particularly appropriate that the amendments proposed in the Veterans Reemployment Statute are offered at this time. If serving in the Reserves or National Guard becomes a burden for our citizens, they will not serve and the active duty force must be used to take up the slack if national security is to be maintained.

In general, Mr. Chairman, The American Legion concurs in all of the proposed amendments to Chapter 43. We are particularly pleased to see that the Federal and State Governments as well as the Government of the District of Columbia are included. We are also pleased that appropriate sanctions against discrimination are part of the bill. We are aware of at least one case where an individual was not hired for a job because of membership in the National Guard. Practices such as this are intolerable and must be prevented.

Mr. Chairman, we are also pleased with the enforcement provisions. There is one additional provision we would like to see inserted, however. One of the fundamental rights of being a citizen in this country is the right to the collective judgment of one's peers on the rightness or wrongness of an action. In this case, the penalties are not criminal but civil and while that is appropriate, we believe that cases brought to the courts under the new provisions of Chapter 43 should be heard by a jury rather than a judge, provided the defendant or the plaintiff so desires. Such a provision would protect the rights of both the military reservist or National Guard Member, and the employer. We commend this suggestion to your attention.

With respect to the veteran being able to seek relief in the courts, as this committee is aware, such action typically involves the retention of legal counsel. We have no quarrel with the use of counsel, but if a veteran retains counsel, and the court ultimately finds in favor of the veteran, it should not be the veteran who pays for the legal representation. The defendant employer should be held responsible for the legal bills of the veteran plaintiff. It is not clear whether this provision is permitted under the

amendments. If it is not covered, I commend the idea to your attention.

Mr Chairman, as you know, there is a wellspring of good feeling about the outcome of our recent actions in the Persian Gulf area. There is also a wellspring of good feeling about the troops who have served there. They will return home to the heroes' welcome they so richly deserve. But there are active duty troops who never went to the gulf and not every reservist was called up. This legislation also protects them and we congratulate you and this committee for your foresight in including the broad range of people under its provisions.

Mr. Chairman, The American Legion looks forward to working with you on passage of this important legislation and at this point, I will be happy to answer any questions.

STATEMENT OF
RONALD W. DRACH
NATIONAL EMPLOYMENT DIRECTOR
DISABLED AMERICAN VETERANS
BEFORE THE
SUBCOMMITTEE ON EDUCATION, EMPLOYMENT AND TRAINING
OF THE
VETERANS AFFAIRS COMMITTEE
U.S. HOUSE OF REPRESENTATIVES
March 7, 1991

MR. CHAIRMAN AND MEMBERS OF THE SUBCOMMITTEE:

On behalf of the more than 1.3 million members of the Disabled American Veterans and its Ladies' Auxiliary, I am pleased to appear before you today to present our views on your discussion draft bill to amend Chapter 43, Title 38, United States Code, relative to Veterans' Reemployment Rights (VRR).

Mr. Chairman, we want to thank you and the other members of this Subcommittee for your continuing concern over the employment rights of our Nation's veterans. This Subcommittee has long been the "point man" that has led the rest of the Congress to provide meaningful employment legislation for veterans.

Mr. Chairman, approximately three years ago, former Assistant Secretary of Labor for Veterans' Employment and Training (ASVET) Don Shasteen announced his office was working on a comprehensive rewrite of the veterans' reemployment rights statute. Assistant Secretary Tom Collins has stated the same thing. Still, the Department of Labor has not provided this Subcommittee with any draft legislation for consideration and action. Perhaps the Department of Labor is not going to seek introduction of any comprehensive legislation. If they don't, it would be no surprise.

Mr. Chairman, in the past 15 years, no Administration, to my knowledge, has ever proposed employment legislation designed to address employment concerns and needs of our Nation's veterans. On the contrary, with minor exceptions, every Administration since President Nixon has actually opposed employment initiatives for our Nation's veterans.

Giving the Department of Labor the benefit of the doubt and assuming they are still working on a piece of legislation after three years, it is somewhat ironic that they have picked a program that has worked relatively well. The Disabled American Veterans has not had a reemployment rights complaint in recent memory. That certainly indicates to us that the program is well run and apparently effective. This could be attributable to the clear mandate given to employers by existing law as well as a body of case law interpreting the reemployment statute. With that background, the Disabled American Veterans is pleased to provide the following comments and thoughts on your draft legislation and some attendant issues.

Mr. Chairman, before I address those issues, permit me to offer an observation that may be more appropriate for a later oversight hearing. As we are all aware, last week President Bush declared a cease-fire in the Persian Gulf War. Assistant Secretary Collins' office is preparing to provide public information and assistance to reservists and employers on the reemployment rights program. This is good. However, they apparently have taken no action to review the needs of the thousands of troops who will return from the Persian Gulf without reemployment rights and who will be in need of employment services. Because of our concern, we sent

Mr. Collins a letter on March 1, 1990, asking for a detailed plan of action to address the employment needs of unemployed veterans. A copy of that letter is attached.

Mr. Chairman, we believe that reservists, guardsmen and others who have served our country and have potential reemployment rights will have little difficulty in exercising those rights. Employers have been very receptive and responsive to their obligations according to most news accounts. Many employers have even gone beyond statutory requirements to assure their valued employees who have made the commitment to serve our country are adequately cared for upon their return. This includes action by Constance Newman, Director of the Office of Personnel Management. Some of those actions are as follows:

- OPM will issue a reminder to federal agencies that certain reservists are eligible for veterans' preference.

- OPM issued a Federal Personnel Manual letter reminding departments and agencies of health benefits continuation for reservists on active duty.

- OPM issued a memorandum that in the event budgetary requirements necessitated the furloughs of civilian employees encouraging "... each federal agency to make exceptions from furloughs for any civilian employee who performs active military duty during the crisis in the Middle East."

- OPM issued a memorandum reminding agencies of the following:

  (1) Retain employees who perform active military duty on the agency's employment rolls in the same position held before their departure.

  (2) Pay the employee's share of health benefits premiums while in a LWOP status during this crisis.

  (3) Use Employee Assistance Programs (EAP) to provide counseling and referral services for affected employees and family members.

- One law firm in New York prepared a memoranda designed for employers outlining their obligations to activated reservists in the work force.

- Other private employers took additional steps such as:

  (1) Providing company newsletters to activated reservists.

  (2) Extending health and life insurance.

  (3) Inviting dependents to join wellness and recreation programs.

  (4) Written and verbal communications to dependents to make sure they understand insurance options.

  (5) Extend pay and benefits 90 days beyond that required.

Mr. Chairman, based on the aforementioned, we believe that most employers want to do what is right and what is required by law. Some employers, as indicated, have already gone beyond that required by law. Accordingly, we believe that there will

be few complaints filed by those with reemployment rights against their employers. We do, however, anticipate there will be many inquiries from reservists and others as well as employers as to what the rights and obligations are. In that regard, we commend Mr. Collins and his staff for preparing public service announcements and other information in response to that need. However, we remain critical of his lack of action for those nonreservists who will need help.

Mr. Chairman, I would like now to turn to your discussion draft and offer the following comments.

Overall we are very pleased with the language in the draft. We are particularly pleased with and urge the retention of Section 2022, "Relation to Other Law." On page 4, line 18, I bring to your attention the phrase, "successors in interest." We believe this is very positive, especially in today's economy as more and more employers are filing for bankruptcy protection. Others are being bought out by larger corporations or competitors.

In defining who is an employer in the federal government, the draft includes the executive branch as well as "... any executive agency as defined in Section 105 ..." of Title 5, U.S. Code. We recommend that that definition be expanded to include Sections 103 and 104 of Title 5. Section 104 defines independent establishment and includes the General Accounting Office (GAO). Section 105 defines executive agency. We believe all of these components of the federal government should be providing reemployment rights benefits.

Even with the inclusion of Sections 103 and 104, it is not clear who is covered. We wonder about such agencies as:

- The Federal Reserve Board and its Board of Governors,
- The Securities and Exchange Commission,
- Tennessee Valley Authority (TVA),
- Resolution Trust Corporation (RTC),
- Federal Deposit Insurance Corporation (FDIC),

as well as many other commissions and corporations.

Mr. Chairman, I do not know if they fall under Sections 103, 104 or 105. We do believe they should be covered.

We don't have a specific recommendation, but we do have a concern over the use of the term "temporary position" (page 5, line 15). Our concern, Mr. Chairman, is limited to experiences with federal departments and agencies rather than private sector employers. Federal agencies will use "temporary positions" to avoid exceeding personnel ceilings and to otherwise avoid complying with other provisions of the federal personnel system. It is thus possible that employers could use a series of temporary positions to circumvent the intent of this legislation. We believe this concern needs further exploration.

We are very pleased with Subchapter II--Rights, Limitations and Prohibitions--beginning on page 7, line 7.

Mr. Chairman, we suggest the section dealing with returning to a former employer upon completion of service needs further review (page 10, line 10). The current draft states, "Upon completion of service in the uniformed services ... a person entitled to reemployment ... shall report to such person's employer for reemployment ...." (Emphasis added.) We suggest

the language, "shall report to," be modified to read, "shall advise." If the eligible service member notifies the employer that he or she is out of the military, an agreement could be reached with the parties to assure a reasonable report date acceptable to both.

Mr. Chairman, a discussion of reemployment rights for those disabled on active duty begins on the bottom of page 13. We are very appreciative of the effort taken to assure those military persons who incur a disability while serving on active duty be provided needed protections. However, we do see circumstances when the disability could be so severe as to necessitate extensive training.

Your draft takes into consideration the need for hospitalization and convalescence and allows such a person up to one year to establish reemployment rights status. We are concerned that in the case of a severely disabled veteran who needs retraining, the one-year time frame may not be enough. We suggest a provision be added that would allow for an extension of the one year under circumstances to be prescribed by the Secretary of Labor in consultation with the Secretary of the Department of Veterans Affairs. This could be done to assure the employer, the disabled veteran and the VA's vocational rehabilitation division work out a rehabilitation plan compatible with the disabled veteran's needs as well as the employer's. We suggest that the disabled veteran still has an obligation to notify the employer of his or her desire with respect to reemployment and such training.

Mr. Chairman, we appreciate the provision that prohibits an employer from terminating a reemployed veteran except for cause. We believe this is a very important provision that would extend additional protections to veterans.

Mr. Chairman, we have long had a concern about the difference in assistance provided former federal employees seeking reemployment rights compared to private sector employees seeking the same benefit.

In the case of an employee in the private sector who has a complaint, the individual will receive assistance and representation, including court action initiated by the Department of Justice on his or her behalf. By contrast, a former federal employee trying to exercise reemployment rights, will be told to file with the Merit Systems Protection Board (MSPB). This disparity is addressed to some degree on page 20 of the discussion draft, but we believe it does not go far enough.

The draft provides assistance to "... include representation before the Merit Systems Protection Board but not before the Federal Circuit Court of Appeals or the Supreme Court on appeal from the Merit Systems Protection Board." It is not clear who would provide that representation. We suggest this not be limited to MSPB. Under the current system, private sector employees seeking redress have full representation throughout the court system if it is determined by the Department of Labor and the Department of Justice that court action is warranted. We strongly believe that federal employees should receive no less than private sector employees and urge you to amend your draft to so indicate.

Mr. Chairman, as an aside to that issue, I would like to point out that OPM officials have been very responsive to the issue of assuring returning Persian Gulf veterans their reemployment rights as intended by law. At a recent meeting of the Secretary's Committee on Veterans' Employment (SCOVE) at the Department of Labor, Deputy Director of OPM, Bill Phillips,

indicated that he and Director Newman would be willing to take any case where a federal agency declined to comply with the law, if necessary, "to the Oval Office." Mrs. Newman and Mr. Phillips have been unwaivering in their support for providing everything possible to those federal employees who have been called up to active duty during the current crisis. We are very appreciative of that and would be remiss if we did not so indicate.

Mr. Chairman, I stated earlier we have had minimal inquiries on reemployment rights and in recent memory have not had an actual complaint. We are, however, supportive of a provision that provides a "... civil penalty of not more than $25,000 for each such failure or refusal ..." to reemploy an eligible veteran. There may be recalcitrant employers who would be more amenable to comply with the law if they knew they were faced with not only back pay but a substantial civil penalty. We suggest that such a penalty be used only in extreme cases.

We are concerned that Section 2051(a) grants the Secretary of Labor authority to discuss a veteran's complaint without investigating it. Language should be added requiring the investigation of all properly filed complaints.

Mr. Chairman, in conclusion, I would like to again thank you for holding these hearings on this most important and timely issue. Because of the importance of this, I would like to commit to you and your staff the availability of the services of myself and Associate National Employment Director Len Gilmer to further discuss this bill with you or members of the staff.

Robert F. Skwaryk
5462 West Ridge Road
Erie, PA 16506

March 25, 1991

Honorable Timothy Penny
335 Canon House Office Bldg.
Washington, D.C. 20515-2301

Subject: Testimony to be inserted in the hearing record for House Bill H.R. 1578, introduced on March 21, 1991.

On March 7, 1991, when the hearing on House Bill H.R. 1578 was taking place, I was at Kuwait International Airport serving as the Naval Gunfire Liaison Officer for the First Battalion, First Marines, First Marine Division, and unable to attend the proceeding.

On March 22, 1991, I spoke with two staff members from your committee who suggested that I submit my testimony in writing.

I am presently at Camp Pendleton, California awaiting my release from active duty. Through the kind efforts of your staff and those of Representative Ron Packard's Carlsbad, California office, I was able to obtain a copy of House Bill H.R. 1578.

My testimony to be inserted in the hearing record is attached.

Please note that my testimony is personal and does not reflect the views of the Armed Services, the Naval Reserve Association, or any other person, or any organization to which I belong.

If I can be of further assistance, please contact me at (814) 833-8954 or (717) 783-6398.

Respectfully submitted,

Robert F. Skwaryk

Robert F. Skwaryk

Enclosure

Testimony of Robert F. Skwaryk
to be inserted in the
hearing record of House Bill H.R. 1578

My comments will be brief and directed toward the enforcement procedures found under Section 2022, Chapter 43 of Title 38, United States Code Annotated, and the unemployment compensation benefits provided for reservists who are refused re-employment by their civilian employer upon their release from active duty.

My testimony is personal and does not reflect the views of the Armed Forces, the Naval Reserve Association, or any other person, or any organization to which I belong.

I am a U.S. Naval Reserve officer who was recalled to active duty in December 1990 from my civilian employment as an Administrative Law Judge for the Commonwealth of Pennsylvania.

On March 7, 1991, the date of the committee's first hearing on House Bill H.R. 1578, I was at Kuwait International Airport serving as the Naval Gunfire Liaison Officer for First Battalion, First Marines, First Marine Division. This was my third war, having also served as an enlisted Marine in Vietnam, and as a Naval Officer in Beirut, Lebanon.

In June 1985, upon my release from active duty with the U.S. Navy, I requested, but was denied, re-employment as an Unemployment Compensation Appeals Referee with the Commonwealth of Pennsylvania's Department of Labor and Industry. This injustice occurred under then Governor Richard Thornburgh's Administration.

I filed my claim for prior-military unemployment compensation benefits (hereinafter, "U.C.X.") in Pennsylvania, and faced the unfairness of waiting four weeks for my first U.C.X. check. Under President Reagan's administration, the Unemployment Compensation Law was changed and subsequently required a U.C.X. claimant to serve four waiting weeks as compared to a non-military claimant who only served one waiting week before receiving a weekly benefit check.

During these four weeks, I was in contact with Mr. Joseph Rogers of the U.S. Department of Labor's Office of Veterans Affairs in Pittsburgh, Pennsylvania. As provided under Section 2022, Chapter 43 of Title 38, United States Code Annotated, Mr. Rogers contacted and counseled the Pennsylvania Administrator who was improperly refusing to rehire me to my former position.

Also during this time, I was researching the enforcement procedures under Section 2022, Chapter 43 of Title 38, United States Code Annotated, and discovered that in 1984, Congress struck out the provision which required the Federal District Court to order a speedy hearing in a Veterans Re-employment Rights Lawsuit and to advance it on its calender.

It became clear to me that an employer who wanted to "play hardball" could improperly refuse or delay rehiring the returning veteran in an attempt to force him to find other employment.

Please note that if the U.C.X. claimant refused an offer of suitable work with another employer, he would lose his U.C.X. benefits. Also, as a practical matter, as Section 2022, Chapter 43 of Title 38 United States Code Annotated, now stands, any other wages earned or U.C.X. money received would be deducted from the monetary judgment awarded by the Court years after the initial filing of the petition for reinstatement.

In July 1985, at an open house for the Veterans Administration's new Outreach Center in Erie, Pennsylvania, I personally told Congressman Tom Ridge, a purported Vietnam Veteran, of this problem with Section 2022, Chapter 43 of Title 38 United States Code Annotated. My comments were ignored by Congressman Ridge and his staff. If he had acted on my warnings at that time, the current re-employment problems facing recalled reservists under Operation Desert Shield/Storm might have already been addressed.

In September 1985, through the effort of the V.A.'s Joe Rogers, Pennsylvania State Senator Anthony "Buzz" Andrezeski and various representatives from veterans organizations, as well as my preparation for filing a petition for reinstatement in Federal District Court, I was reinstated to my former position as an Unemployment Compensation Appeals Referee with the Commonwealth of Pennsylvania.

During the three months I was being unfairly denied my re-employment rights, and having to serve the requisite four waiting weeks for U.C.X. benefits, I was forced to spend most of my savings.

I submit to this Committee that Section 2022, Chapter 43 of Title 38, United States Code Annotated, should be amended to awarded punitive as well as compensatory damages to a veteran if the Court finds that the employer did not have good cause to delay or refuse rehiring the veteran. Also, the requirement for a speedy hearing must be reinserted in this Section. Otherwise the Veteran's Re-employment Rights Law lacks any real deterrence to an employer who acts in bad faith and fails to rehire the returning Veteran.

As to the issue of veteran's unemployment compensation benefits, I would ask this committee to refer to the appropriate committee the inequities in the unemployment compensation law in the following four areas:

First, the four waiting weeks requirement for U.C.X. recipients must be eliminated.

Secondly, a federal standard for U.C.X. weekly benefits rates should be instituted. As the law now stands, the state in which the initial U.C.X. claim is filed determines the amount of the weekly benefit rate. Consequently, two veterans with the same base year military wages would receive different weekly benefits depending on the state in which they filed their U.C.X. claim. This disparity in weekly benefit rates is unfair given that their base year wages are federal military wages.

Thirdly, a veteran who is recalled to active military service and as a result receives lower military wages as compared to his previous civilian wages should not be penalized in lowered base year earnings and a subsequently lowered weekly benefit rate. That is to say, the returning veteran's weekly benefit rate should be figured on his higher civilian wages as if he had not been recalled to active duty.

As it now stands, a veteran who returns to his civilian employment and subsequently gets laid-off may find that his base year earnings are comprised solely of his lower military wages. He then would receive a lower weekly benefit amount than what he would have received if not recalled to active duty. This is unfair to the veteran.

Fourthly, a veteran should not be subjected to loss of U.C.X. benefits for refusing suitable employment when a claim for reinstatement to his former employer is pending with the V.A. or Court.

In summation, having recently breached the two belts of mine fields laid by the Iraqi Army in Kuwait and the burning oil well fires of Al Burq`an and Kuwait City, I ask this committee to legislatively defuse the mine field now facing myself and other veterans who seek reinstatement to their prior civilian employment, and to rectify the unfair and disparate treatment of veterans found under the Unemployment Compensation Law.

Thank you for allowing me to make this statement to the committee.

FLEET RESERVE ASSOCIATION

Representing All Enlisted Personnel of the
U.S. NAVY ☆ U.S. MARINE CORPS ☆ U.S. COAST GUARD

1303 New Hampshire Avenue, N.W., Washington, D.C. 20036 • (202) 785-2768

27 February 1991

The Honorable Timothy J. Penny
Chairman, Subcommittee on Education,
Training, and Employment
Committee on Veterans Affairs
U.S. House of Representatives
335 Cannon House Office Building
Washington, D.C. 20515

Dear Chairman Penny:

We have reviewed the discussion draft bill which would amend Chapter 43, Title 38, United States Code (Veterans' Reemployment Rights) forwarded with your letter of February 15, 1991.

FRA's primary legislative focus is in those areas that affect our career Sea Services (USN, USMC, and USCG) members. Although we are interested in Veterans' Reemployment Rights, we lack indepth expertise on our staff in this particular area. I am therefore reluctant to offer written testimony. I know that some of the veterans organizations plan to do so.

As near as we can determine the discussion draft looks great and will be beneficial to service members leaving the armed services in the future, particular the sizeable members that will likely occur upon conclusion of Operation Desert Storm.

If FRA can be of assistance with this proposed legislation as it hopefully works its way through the Congress, please let me know.

With best wishes,

Sincerely,

Norman E. Pearson

NORMAN E. PEARSON
National Executive Secretary

NEP:aaw

STATEMENT OF

ROBERT L. JONES
AMVETS NATIONAL EXECUTIVE DIRECTOR

To the

SUBCOMMITTEE ON EDUCATION, EMPLOYMENT AND TRAINING

OF THE

VETERANS AFFAIRS COMMITTEE
U.S. HOUSE OF REPRESENTATIVES

On

VETERANS' REEMPLOYMENT RIGHTS

Thursday, March 7, 1991

Thank you for the opportunity to comment concerning the need to enhance Veterans Reemployment Rights (VRR) laws that are presently embodied in Chapter 43, Title 38, United States Code. The purpose of the VRR laws is to preserve the economic well-being of young men and women who have volunteered to participate in all facets of our nation's Ready Reserve without incurring penalties for their volunteerism.

The total force concept incorporated into our strategic defense planning and the demands of our labor market as projected in "Workforce 2000" studies have demonstrated the antiquated nature of the current law. Since enacted, VRR laws have evolved into an administrative morass that hampers basic understanding let alone enforcement.

As the nation basks in the euphoria of our recent military success, it is wise to analyze existing VRR statutes and to prepare revisions that will secure the reemployment rights of those called to serve. If the philosophy of VRR is to secure economic well-being, then one must ask how can this be assured in an economic environment that saw the loss of over 1.5 million jobs between August and December 1990 and in which our nation's employers, in a budgetary decision, are placing greater demands on a temporary workforce. If the job or the employer is no longer there, the good intention of VRR statutes is lost. For this reason it is suggested that members of our nation's Ready Reserve be considered as "eligible" for the purposes of Section 2001, Chapter 41, 38 USC and any formula utilized in determining staffing levels for disabled veteran outreach specialists.

AMVETS experience with members of the Ready Reserve clearly indicates that they, the intended recipients of VRR benefits, are poorly informed of their entitlements. In our opinion it is not the responsibility of an already over-taxed Office of the Assistant Secretary of Veterans Employment and Training Service (OASVETS) to

provide information and training concerning VRR. It is a clear responsibility of the Department of Defense, in particular the Assistant Secretary for Reserve Affairs, to educate their troops on matters pertaining to VRR. This is not presently being accomplished in an adequate manner. VRR employment specialists should be outstationed in major reserve centers to serve as the catalyst for training and for complaint intake.

The OASVETS, with the enforcement responsibility within the Department of Labor, must be adequately staffed and funded to perform the task. VRR is presently an additional duty for OASVETS staff at the state level. Inadequate travel funds and excessive demands are impeding the ability to adequately perform the principle requirements of their job -- ensuring preferential employment services to veterans. VRR is a needed entitlement, however, to be effective it must be staffed and funded.

AMVETS is concerned about the rights of Ready Reserve members who are employed by the District of Columbia (DC) and the federal government. The right of representation is blurred as is the role of the Merit System Protection Board. A reservist who pursues a complaint to the federal courts should not be denied representation because that reservist is an employee of the government or the District of Columbia. In particular, employees of the District of Columbia are no longer dependent upon the Office of Personnel Management but have their own personnel system. Thus, they should be afforded the protections extended to any state employee. A federal employee must not receive less protection than private sector employees. AMVETS is concerned that the rights of employees in "exempt" federal agencies are not clearly defined.

During the recent deployment, AMVETS witnessed the recall of military retirees to augment our active duty forces. What are the rights of this group of ex-service personnel who are given "hip

pocket" orders upon retirement and who are reestablishing themselves as members of the civilian labor market? Any VRR revisions must recognize and define all categories of service personnel subject to activation and clearly describe their entitlement to protection. Mr. Chairman, we note that a five year window of protection is provided. The question that has been asked of AMVETS is, "Is this window accumulative and is it realistic in view of the total force concept." While it is recognized that the intent is to define a "period of service" several midwest employers interpreted existing statutes as being accumulative in an effort to deny rights.

AMVETS supports the punitive clauses of the discussion draft. We envision the articulation of penalties as an instructive to employers to comply with the intent of the statute and will facilitate resolution of complaints early in the investigation process. Punitive action should only be exercised as a last resort to resolve a VRR case. We view this process as requiring extensive expertise, and to be performed adequately, it requires dedicated staff as previously discussed. The power to subpoena will compound the need for additional "paralegal and investigative procedural" training. It should be noted that the National Veterans Training Institute (NVTI) goes unfunded by the administration in fiscal year 1992.

We are also most concerned over the vague definition of "temporary position". It is recognized that employers, in an effort to cut personnel benefit costs, are utilizing temporaries extensively in their labor forces. The federal government has a category of employee routinely called a "permanent temporary" who has little or no benefits, rights or protection. A vague definition invites misinterpretation, confusion and abuse. We encourage use of a definition of permanent temporary position as one in which an individual works 30 or more hours per week and there is a reasonable expectation that employment will continue

indefinitely. By including members of the Ready Reserve as "eligible" as previously recommended, employment opportunities are extended to those who are employed less than 30 hours per week, are underemployed or become displaced.

AMVETS encourages the congress, in concert with the administration, to act expeditiously to enact a comprehensive revision to the ancient VRR statute currently in existence. We have waited far too long for action. The congress should also review the rights of these individuals who will be returning to their civilian jobs only to find they have an additional waiting period before their health benefits are again in force. Surely we should not expect these veterans and their families to be without the benefit of health care which was previously provided before being called to active duty. Further, we recommend provisions to allow disabled veterans an extension to establish VRR status allowing for rehabilitation needs.

We are grateful for the opportunity to comment on the Discussion Draft circulated in the 102nd Congress to amend Title 38 USC with respect to Veterans Reemployment Rights. As a major veterans service organization and an employer, AMVETS stands ready to fulfill its duty to members of the Ready Reserve. We will assist, within our capabilities, to ensure they benefit from all entitlements earned through their honorable service.

STATEMENT FOR THE RECORD
BY
CLIFTON E. DUPREE, ASSOCIATE LEGISLATIVE DIRECTOR
PARALYZED VETERANS OF AMERICA
BEFORE THE
SUBCOMMITTEE ON EDUCATION, EMPLOYMENT AND TRAINING
OF THE
HOUSE COMMITTEE ON VETERANS' AFFAIRS
CONCERNING
VETERANS REEMPLOYMENT RIGHTS

MARCH 7, 1991

Mr. Chairman and Members of the Subcommittee, on behalf of the members of Paralyzed Veterans of America (PVA), I appreciate this opportunity to provide a statement for the record concerning the proposed legislation to amend Chapter 43, Title 38, United States Code, relative to Veterans' Reemployment Rights (VRR).

Mr. Chairman, we want to thank you and the other members of this Subcommittee for your continuing concern over the employment rights of our Nation's veterans. The two main reasons for the proposed amendments include: (1) To support non-career service in the uniformed services by minimizing any disadvantages that would occur because of such service, and (2) To minimize any disruption of life to persons involved in such service. The basic principle of the "Veterans Reemployment Rights Amendments Act of 1991" is to insure that no member of the Armed Services will be discriminated against in regard to: employment, reemployment, or continuation of employment because of being called to active duty service. Under this act, employers are forbidden to deny any form of reemployment if active duty military service was a "motivating factor" in making his/her decision, unless that employer can prove that reemployment would have been denied for other reasons.

The proposed legislation should clarify the meaning of the statement "unless such employer's circumstances have so changed as to make reemployment impossible or unreasonable;" sec. 2032.(a).(1).pg.9. We believe this statement is too vague and gives the employer a wide range of situations in which they can define reasons for not reemploying someone that would be affected by this Statue.

Mr. Chairman, we are very appreciative of the effort taken to assure those military persons who incur a disability while serving on active duty be provided needed protections. However, we do see circumstances when the disability, such as a spinal cord injury could be so severe as to necessitate extensive training or vocational rehabilitation efforts. This proposed amendment takes into consideration the need for hospitalization and convalescence and allows such a person up to one year to establish reemployment rights status.

We are concerned that in the case of a severely disabled veteran such as a spinal cord injury who will need retraining, the one year time frame may not be enough. We suggest a provision be added that would allow a discretionary extension of the one year under circumstances to be prescribed by the Department of Labor in conjunction with the Secretary of the Department of Veterans Affairs for those severely disabled veterans needing a longer period to recover to enable them to be gainfully reemployed. This could be done to assure that the employer, the disabled veteran and the VA's vocational rehabilitation division work together in formulating a rehabilitation plan compatible with the disabled veteran's needs as well as the needs of the employer. However, we suggest that the disabled veteran still has an obligation to notify the employer of their desire with respect to reemployment and training.

Mr. Chairman, in conclusion, I would like to thank you again on behalf of the members of the Paralyzed Veterans of America for holding this hearing on this most important and timely issue.

NAVAL RESERVE ASSOCIATION

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NATIONAL PRESIDENT
LESTER ROBERT SMITH
REAR ADMIRAL, USNR

EXECUTIVE DIRECTOR
J.E. FORREST
REAR ADMIRAL, SC, USN (RET)

13 March 1991

The Honorable G. V. (Sonny) Montgomery
Chairman, Committee on Veteran Affairs
U.S. House of Representatives
337-A Cannon House Office Building
Washington, D.C. 20515

Attention: Ms. Beth Kilker

Dear Chairman Montgomery:

In response to your letter of March 8, 1991 I have enclosed answers to the additional questions of the Honorable Timothy J. Penney in reference to the Education, Training and Employment hearing of March 7, 1991.

Respectfully,

Philip W. Smith
RADM, USNR (Ret)
Director of Legislation

Encl.

PWS/kac:ds

WRITTEN COMMITTEE QUESTIONS AND THEIR RESPONSE

QUESTIONS
MILITARY ASSOCIATION PANEL

1. Question: Admiral Smith, in your testimony you suggested that VRR cases be considered for inclusion under certain provisions of the Civil Rights Attorney Fees Act. Would you tell us more about the attorney fee provisions? What categories of actions are entitled to attorney fees under that Act?

   Answer: The provisions of the Civil Rights Act, 42 U.S. Code 1988, provide that in the enforcement of violations of the Civil Rights Act, the court may, in its discretion, allow the prevailing party, other than the United States, a reasonable attorney's fee as a part of the costs. The relief provided by this provision, by amendment, has been extended to the Americans with the Disabilities Act, other EEO cases, and some violations of the Internal Revenue Code. It would be possible and consistent to also extend this relief to violations of the VRR Act by Amendment if the Committee feels this action has merit.

2. Question: Is it your sense that the Department of Labor and the Department of Justice are staffed adequately to handle the increase in VRR cases that can be anticipated in the future?

   Answer: This is of necessity an opinion based on the limited experience of our Association with VRR cases. We have had reports in the past of investigative delays occasioned by a paucity of Department of Labor VRR investigations, and of low priorities being assigned VRR cases by the Justice Department. I would expect that both departments would be stressed unless significant emphasis is placed upon assigning a high priority to VRR cases.

3. Question: What VRR-related problems do you most often hear about from your members?

   Answer: The Naval Reserve Association is composed of 25,000 Naval Reserve officer members and, as such, constitutes a group somewhat less affected by VRR problems then the enlisted members of the Naval Reserve. Our information on VRR problems comes primarily from our JAG members who assist and counsel sailors, and from our sister organization, the Naval Enlisted Reserve Association. Third party complaints about reluctance to release the reservists for training duty, and less than subtle pressure to disaffiliate with the reserve components seems to be most prevalent with Federal employees and small business employees.

kac:ds

The American Legion

For God and Country

★ WASHINGTON OFFICE ★ 1608 K STREET N.W. ★ WASHINGTON, D.C. 20006-2847 ★
(202) 861-2700 ★

March 20, 1991

Hon. G. V. (Sonny) Montgomery, Chairman
Committee on Veterans' Affairs
U.S. House of Representatives
335 Cannon House Office Building
Washington, DC 20515

Dear Mr. Chairman:

Attached to this correspondence are the three questions submitted by Congressman Tim Penny regarding veterans' re-employment rights.

The American Legion is honored to have been able to participate in the formulation of new legislation on this subject. If you or any other member of the Committee has questions, please be in touch.

Sincerely,

James B. Hubbard, Director
National Economic Commission

dcj

cc: Phil Riggin

1. Have you had an opportunity to review the Administration bill? If you have, what provisions of that bill do you believe should be incorporated into the bill that will be introduced by this Subcommittee? If you haven't yet seen the Administration bill, please provide your views for the hearing record after you've reviewed that measure.

The American Legion believes the Administration's proposal to amend Chapter 43 of Title 38 is a good bill and worthy of enactment with the exception of the following sections which we feel are not in the best interests of the veteran.

With respect to the notification requirements for leaving a civilian occupation, the proposed amendment (2023(5)) defining notification is overly restrictive. While military necessity is covered adequately in an amendment to section 2027(d), the definition in section 2025(5) should be broadened to include notification by any other responsible member of the family such as a spouse, father, mother, etc.

The Administration proposal (section 2025(i)) exempts an employer from the obligation to reemploy if it is "impossible or unreasonable" based on a change in the employer's circumstances. Title 38 currently has such a provision which has been narrowly construed by the courts. We believe that to amend this section invites a re-examination, which would take time and money and may result in a future court decision inimical to the interests of veterans. We recommend this particular section not be included, unless language is included in the Committee Report which indicates that the intent of Congress is to construe this provision narrowly.

The Administration proposal adds section 2027, which requires the employer to continue to maintain health, life and other benefits for members of the National Guard and reserve who serve fewer than 31 days. This is not a problem. The provision also requires the employee who is activated to pay the entire cost of the benefit plan after 31 days. The American Legion disagrees with this. We are aware of some corporations which choose to keep a benefit package in place for longer periods of time. We believe these corporations should be able to do this if they so choose.

2. In your view, what are the most pressing issues that must be addressed in a Chapter 43 rewrite?

There are several issues to be addressed in any rewrite of Chapter 43, Title 38 USC.

It is important to enact measures that grant re-employment rights based on length of time served, and remove those based on character of service. A reservist or National Guard member is exposed to the same hazards whether called up only for training, or for an extended period. Adding deployment to a combat theater only adds to the danger.

Both versions of VRR legislation we have seen set forth the purposes of codifying veterans' re-employment rights, purposes which are not now present in Chapter 43 of Title 38 USC. Clearly setting forth these purposes lessens the chance of increased litigation in the future. Thus The American Legion considers a statement of purposes to be critical in any new legislation.

It is important that any new legislation contain clear and unmistakable language indicating that any interpretation of the law by the courts should be that which is most beneficial to the veteran.

The American Legion believes it is necessary to include provisions in the new law for mandatory continuation of health and life insurance coverage for members of the reserves and National Guard for a minimum of 31 days. At some point the provisions of COBRA become operative, but until that time the reservist deserves the protections of the employer's policy.

The provisions concerning special protection against discharge without cause contained in Section 21, Title 38, USC, must be carried over into any new law.

Any amendments to Chapter 43 of Title 38 should include language requiring that should the Justice Department decline to prosecute a case under the statute due to lack of resources, the defendent employer should pay the legal costs of the veteran plaintiff should the veteran win the case. This should be true no matter who the employer is.

The other two areas we believe should be included in a rewrite of this statute are providing the Department of Labor with administrative authority, and providing the Secretary of Labor with the authority to promulgate regulations.

3. We still don't have a good handle on what assistance should be provided federal employees who pursue a VRR case beyond the MSPB. What are your views on this?

The American Legion is not sure why the Administration proposal would not allow the office of special counsel to pursue a claim against the United States beyond the MSPB. In our view, if a case has merit it should be pursued all the way to the Supreme Court if necessary to ensure a veteran's rights are protected. If there is some conflict of interest generated by requiring the office of special counsel to take a claim to the courts, then the law should make some provision for access to a private attorney, at no expense to the veteran, provided the veteran wins the case.

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G.V. (Sonny) Montgomery
Chairman
U.S. House of Representatives
Committee on Veterans' Affairs
335 Cannon House Office Building
Washington, D.C. 20515

Dear Congressman Montgomery:

Enclosed are the answers to the questions you recently sent to me concerning Veterans'Reemployment Rights. I hope you find them helpful. We at EANGUS greatly appreciate your continuing efforts in regards to our membership. Please keep up the good work, and do not hesitate to call me if there is anything that I can do for you in the future.

Respectfully,

Michael P. Cline
Executive Director

MPC:cl

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ANSWERS TO QUESTIONS
MILITARY ASSOCIATION PANEL

1. Is it your sense that the Department of Labor and the Department of Justice are staffed adequately to handle the increase in VRR cases that can be anticipated in the future?

Answer: We have no working knowledge of the staffing and case load of these agencies. In our opinion, any case not immediately attended to would merit further scrutiny of the manpower of both Departments.

2. What VRR-related problems do you most often hear about from your members?

Answer: The majority of the cases we encounter are those concerning employers who discriminate against Guard Members who must attend their required Annual Training. We have also had some cases where individual training has conflicted with weeke work scheduling.

U.S. Department of Labor

Assistant Secretary for
Veterans Employment and Training
Washington, D.C. 20210

April 9, 1991

The Honorable G. V. (Sonny) Montgomery
Chairman, Committee on
Veterans' Affairs
U.S. House of Representatives
Washington, D.C. 20515

Dear Mr. Chairman:

As you have requested, I am enclosing our responses to questions raised by you following the March 7, 1991, hearing on veterans' reemployment rights and the Administration bill. If I can be of further assistance to you, please do not hesitate to contact me.

Sincerely,

THOMAS E. COLLINS

Enclosure

POST HEARING QUESTIONS
HOUSE VETERANS' AFFAIRS COMMITTEE

1. Mr. Secretary, would you tell us what, in your view, are the four or five most significant differences between the Administration bill and the discussion draft, and also tell us, please why the Administration bill's approach is preferable to that in the Subcommittee draft?

The Administration bill was drafted to clarify the law, codify existing favorable court interpretations and decisions, and prevent disparate treatment among servicemembers, while ensuring the bill is consistent with the current "total force policy" of the military services. Important items which are in the Administration's bill but not in the committee's discussion draft or in H.R. 1578 are:

a. In the Administration bill, section 2022(a) would direct the courts to construe this statute liberally for its intended beneficiaries, while section 2022(b) would invalidate agreements purporting to waive reemployment rights not yet in being, such as a contractual waiver of future rights that an employer might demand of an applicant for employment. These provisions would ensure that the law is properly applied and that employers not have a ready mechanism to evade their responsibilities.

b. Section 2025(c) of the Administration's bill authorizes the Secretary of Labor, by regulation, to make additional exceptions to the cumulative five-year service limitation. Such regulatory authority would provide the flexibility necessary to address changes in other statutes and in military personnel

policies, without the need for statutory amendments to the reemployment statute.

c. Section 2032(f) of H.R. 1578, while similar to section 2025(g) of the Administration's bill, is less explicit with respect to the employer's obligation first to reemploy the returning employee and, only then, to investigate in the event that documentation is lacking. See Admin. bill, sec. 2025(g)(2) (last two lines). Timely reinstatement is an essential need of those returning, and the reemployment statute, while giving consideration to the employer's interests, should give an employer little basis to delay or attempt to defeat the obligation to reinstate promptly.

d. Section 2027(a)(1) of the Administration's bill would give persons serving in the uniformed services for fewer than 31 days (e.g., on short tours of training or service), the right to employer-funded health insurance coverage for their families. This provision is important because dependents of persons serving on military tours of fewer than 31 days are not entitled to use the military health care system. The Administration's bill ensures that the employment-related health insurance coverage of Reserve Component members does not lapse during their military training tours. Preventing such lapses may encourage those members to participate in the training needed to maintain or enhance military readiness.

e. Section 4 of the Administration's bill would enact a new Chapter 92 of Title 5, United States Code. H.R. 1578 does not enact such a chapter, but section 2043(a)(2)(B) of H.R. 1578 refers to that chapter, which does not exist in current law. Enactment of that chapter is necessary to provide an effective remedy for Federal employees whose reemployment rights have been breached.

(We also note that in several places H.R. 1578 cross-references sections in Title 10 and Title 32, United States Code. The Administration attempted to minimize such cross-references not only for ease in understanding the statute but also because they may create problems if the referenced sections are amended or repealed, as recently occurred in the current law with respect to section 2024(g) and 10 U.S.C. § 673b.)

2. Could you be more specific regarding the use of the term "other than a temporary position"?

What are examples of temporary positions?

Our interpretation of "temporary position" is one that is intended to last for a specific, brief and non-recurrent time. It is definite in duration and has a specific end date in the relatively near future.

The current statute does not define the phrase "other than temporary," but court decisions have clarified the meaning of the phrase. The determining factor is whether the employment is reasonably expected to continue indefinitely, as opposed to being casual and nonrecurrent. A job need not be "permanent" or "regular" to be "other than temporary." That a position is labeled as "temporary" by the union or by the employer also does not make it temporary within the meaning of the statute. As with the rest of the statute, the phrase is to be liberally construed for the benefit of the servicemember.

Accordingly, any determination is normally made on a case-by-case basis with a liberal construction. One example might be a Christmas season job at a department store if the employee has no reasonable expectation of returning at the next season. Many such seasonal jobs, however, can be "other than temporary." Therefore, to avoid misinterpretations, each situation should receive a case-by-case scrutiny since such a review may yield different results.

S. 336, introduced by Senator Kennedy would eliminate the reference to "other than temporary." What is your position on this provision?

We feel it is not necessary and may be ill-advised to remove the reference to "other than temporary." The phrase has been given a broad reach by the courts and the Department of Labor so that any employment that is reasonably expected to continue for

an indefinite period of time would likely be covered by the statute. Any departure from continuing use of this longstanding concept, which has protected servicemembers well, may signal the courts to interpret "other than temporary" more narrowly and may harm those who may otherwise have been protected. Both the Administration bill and the discussion draft retain the "other than temporary" provision and define it along the lines of judicial interpretations.

3. In later testimony we will hear concern expressed regarding the exemption of employers from the requirement to provide reemployment if the "employer's circumstances have so changed as to make such reemployment impossible or unreasonable." The charge is made that this provision is too vague and broad.

What are examples of circumstances that make reemployment impossible or unreasonable?

The Department's Veterans' Reemployment Rights (VRR) Handbook explains that the current law's "changed circumstances" proviso "was included in the Act primarily to relieve the pre-service employer, or his successor in interest, of the obligation to create an unnecessary job where the veteran's pre-service position would have been lost in any event." VRR Handbook, page 9-1 (1988). This proviso has been construed to be a very narrow affirmative defense for which the employer has the burden of proof.

Section 2025(i) of the Administration's bill adopts the current law's "changed circumstances" proviso almost verbatim,

and the accompanying sectional analysis explains that the new provision is to be given a similarly narrow interpretation.

Could you suggest language that would be more explicit?

The language used relies on existing judicial precedents that have interpreted "impossible or unreasonable" favorably to the veterans and reservists over the years and, as explained in the Sectional Analysis, is sufficiently explicit.

4. The so-called "escalator clause" is absent from section 2026 of the Administration bill but is included in section 2027. I believe it should also be included in 2026. Do you see any problems with that?

We invite your attention to the second sentence on page 15 of the Sectional Analysis accompanying the Administration's bill. That sentence states, "A person entitled to reemployment under Section 2026 is also entitled to seniority and other benefits under Section 2027." We believe that the Administration's bill, as explained by the Sectional Analysis, is sufficiently explicit.

5. A provision of S. 336 would require that a person be considered qualified for an employment position if the individual, with or without reasonable accommodation, can perform the essential functions of the position.

Do you support this provision?

Yes. The Administration bill and the discussion draft provide this protection to the returning servicemember in sections 2026(a) and 2033(a), respectively.

6. In their testimony, the Naval Reserve Association supports the provision in the discussion draft which would provide declaratory or injunctive relief to a reservist before he or she leaves a job for military service.

Why is such a provision not included in the Administration bill?

The Administration bill focuses on correcting violations that have occurred. A statutory provision providing for declaratory or injunctive relief before a violation has occurred is unnecessary to fulfill the aims of the statute. The Department of Labor would, however, provide information, which could include counseling, to assist employers and reservists before a violation occurred.

7. The side-by-side provided the Committee which compares the Administration bill with current law, as well as certain provisions of S. 336 and H.R. 555 will be helpful to us as we more closely examine the Administration bill. It would be significantly more helpful to us, however if it also provided comparison with the Subcommittee discussion draft.

I would appreciate it if you could have this document quickly amended to include a comparison with our discussion draft and provided to us by early next week.

Since the discussion draft has been superceded by the introduction of H.R. 1578, we have not provided an analysis of the discussion draft.

UNITED STATES
OFFICE OF PERSONNEL MANAGEMENT
WASHINGTON, D.C. 20415

OFFICE OF THE DIRECTOR

APR - 9 1991

Honorable G.V. (Sonny) Montgomery
Chairman, Committee on Veterans' Affairs
U.S. House of Representatives
Washington, D.C. 20515

Dear Mr. Chairman:

Enclosed are my responses to follow-up questions from the Honorable Timothy J. Penny relative to my March 7, 1991, testimony before the Subcommittee on Education, Training and Employment and the Subcommittee's consideration of proposed improvements in the Veterans' Reemployment Rights law.

I very much appreciated the opportunity to discuss OPM's recent efforts to maximize Federal employment protections for reservists called to the Persian Gulf and to express our strong support for efforts to make protections for veterans and reservists stronger and clearer.

Sincerely,

Bill R. Phillips
Deputy Director

Enclosure

Follow-up questions for Honorable Bill R. Phillips
Deputy Director, U.S. Office of Personnel Management

1. Q. First, I want to congratulate OPM on its efforts to ensure the fair and equitable treatment of Federal employees who are activated during the Persian Gulf War. Please extend my compliments to Ms. Newman. OPM reacted quickly and positively.

   A. Director Newman appreciates your favorable comment on OPM's efforts to ensure that Federal employees temporarily called to active military duty receive the fullest possible protection of their employment interests. As my statement to your Subcommittee on March 7, 1991, noted, OPM strongly supports proposals to clarify and improve compliance with statutory Veterans' Reemployment Rights protections for all veterans and reservists.

2. Q. It has been suggested that the Postal Service should be considered a private employer for the purposes of VRR. Would you support such a provision? How is the Postal Service treated in the Administration bill? How are agencies such as the FDIC, SEC and TVA treated in the Administration bill?

   A. All of the entities mentioned above were established by law as either an independent establishment of the executive branch or a Government-owned corporation and they have historically been treated like any other agency in the executive branch of the Government for purposes of Veterans Reemployment Rights [see 5 CFR 353.103]. They would retain such status under the Administration's VRR reform proposal.

3. Q. In their testimony, the DAV expresses concerns regarding "temporary employees" in Federal agencies and suggests that agencies could use a series of temporary positions to circumvent the intent of the VRR law. How would you respond to the DAV concern?

   A. There is no evidence to OPM's knowledge that Federal agencies are improperly using temporary appointments for purposes of avoiding VRR obligations. When making a temporary appointment, or extending the service of a temporary employee by noncompetitive conversion to a new temporary appointment, OPM guidance requires the employing agency to provide documentation on the Notification of Personnel Action (SF 50) form to show why the appointment is being made on a temporary basis, i.e., why the agency expects that there will be no permanent need for the employee. OPM is very concerned about potential misuse of temporary employment and we closely monitor agency use of such appointment authority. A little more than one year ago, OPM significantly revised instructions in the Federal Personnel Manual on nonpermanent employment. In part, the changes provided a list of examples showing when use of temporary employees is appropriate as well as a list of inappropriate uses, to assist agencies in this determination.

4. Q. I am concerned that Federal employees are not provided representation before the Federal Circuit Court of Appeals or the Supreme Court. Do you have any suggestions as to how we could remedy this situation.

A. Federal employees who allege denial of veterans' reemployment rights have a collateral right to seek administrative resolution of their claim by the Merit Systems Protection Board, a procedure which permits speedier settlement of such cases than the judicial procedures upon which private sector employees must rely. While OPM is not involved in MSPB's handling of VRR appeals from Federal employees, our understanding is that very few cases arise and OPM believes that the prospect of appeals would become even less likely under the proposed VRR improvements. We understand that the Department of Justice would find serious constitutional objections to having Government representation in the courts for an employee who is suing a Government agency.

U.S. Department of Justice

Office of Legislative Affairs

Office of the Assistant Attorney General

Washington, D.C. 20530

April 9, 1991

Honorable G.V. Montgomery
Chairman
Committee on Veterans' Affairs
United State House of Representatives
Washington, D.C. 20515

Dear Mr. Chairman:

Enclosed are the Department of Justice responses to the additional veterans' reemployemnt rights questions which you forwarded to Deputy Assistant Attorney General Stuart Schiffer by letters dated March 8 and March 14, 1991.

Please note that as question 7 deals with the Administration's budget, it was referred to the Office of Management and Budget. Their response is included in our answers.

We appreciate the opportunity to assist the Committee with its work in this area and look forward to continuing to work with you on this matter.

Sincerely,

W. Lee Rawls
Assistant Attorney General

Enclosure

RESPONSES OF DEPARTMENT OF JUSTICE TO ADDITIONAL QUESTIONS

1. Would you agree with me that, after the euphoria of Desert Shield/Desert Storm has subsided, we can anticipate an increase in problems associated with veterans' reemployment rights, particularly in relation to discrimination in initial employment?

Response: We recognize that it is possible that some employers may be reluctant to retain or to hire reservists in the aftermath of the recent call-up and that there may consequently be an increase in the number of veterans' reemployment rights ("VRR") disputes.

Is there adequate DOJ staff to handle a significantly increased number of cases on a timely basis?

Response: Yes. The Department of Justice is prepared to handle an increase in the number of these cases and to do so expeditiously. It is important to note that the vast majority of VRR complaints are resolved amicably by the Department of Labor ("DOL") without the need for litigation. We understand that DOL resolves over 95 percent of these complaints in this manner; and we have no reason to believe that DOL will be any less successful with respect to any future increase in the number of complaints. Over the past ten years, we have had an average of approximately 58 VRR cases nationwide per year referred to us by DOL. In the event that the number of referrals were to increase significantly, we would dedicate whatever additional resources were necessary to ensure that the cases were handled promptly and efficiently.

In reality, doesn't DOJ often delegate authority to Department of Labor attorneys on a case-by-case basis on the local level?

Response: No. The Department of Justice does not delegate its authority to litigate VRR cases to DOL attorneys. While DOL attorneys often do provide advice and assistance to us in the conduct of VRR litigation, they do so under the control and supervision of the United States Attorneys. Our working relationship with DOL attorneys in VRR cases is no different from our working relationship with agency counsel in other types of cases. The Department of Justice routinely calls upon agency counsel for advice and assistance in handling matters in litigation, without regard to the nature of the claim or the agency involved. In some instances, agency attorneys, including those from DOL, are appointed as Special Assistant United States Attorneys, so that they can participate fully in the litigation process.

2. It is my understanding that of the 57 VRR cases referred to DOJ in FY 1989 for litigation, 22 were still pending as of January 1991. Would you provide the Subcommittee with the current status of those cases and a brief description of each case?

Response: Department of Justice records indicate that a total of 49 VRR cases were referred to us by DOL during FY 1989. Not all of those cases were referred to us for litigation. In 20 of the cases, DOL concluded that the veteran's complaint was without merit, but referred the matter to us at the claimant's request with a recommendation that representation not be provided. We declined to provide representation in those 20 cases because we agreed with DOL, based upon our own independent review of the record, that the facts did not support the claimant's assertion of rights under the VRR law. In one other case (which DOL acknowledged was a "close case"), we disagreed with DOL's recommendation and denied the claimant's request for representation after consulting DOL and determining that the Regional Solicitor's office (from which the case was referred) had no objection to our denial of representation. In those instances in which the Department of Justice declines to grant representation, the referral is returned to DOL, which notifies the claimant of our decision and advises him (or her) that the decision does not preclude employment of private counsel.

The remaining 28 FY 1989 referrals were assigned to United States Attorneys for handling. Of those 28 cases, 19 have been closed and 9 are still pending. A brief description of these pending cases, along with a statement of the status of each, is set forth below:

1. W. Todd Caltagarone v. Borough of Reynoldsville, No. 90-0043 (W.D. Pa.). Mr. Caltagarone was employed by the Borough of Reynoldsville, Pennsylvania, for two years as a part-time police office prior to his enlistment in the Air Force. After completing three and one-half years of active duty service, Mr. Caltagarone requested reinstatement to his former position. The employer denied the request. Discovery has been completed and the parties have filed pretrial submissions. The employer's motion for summary judgment is pending. No trial date has been set.

2-3. Melvin S. Cohen and David J. Hazell v. Massachusetts Teachers Retirement Board, No. 89-1806-Z (D. Mass.). The complaints of Messrs. Cohen and Hazell, who are public school teachers in Massachusetts, were referred to us as two separate cases. Since both present claims against the same defendant, a single suit was filed. The case challenges the refusal of the Massachusetts Teachers Retirement Board to grant retirement

military service performed during the 1980s. The parties' cross-motions for summary judgment are pending.

4. John A. Elder v. Newport News Shipbuilding Co., (E.D. Va.). Mr. Elder, an Air Force reservist, was employed by Newport News Shipbuilding as a wage grade employee before being ordered to active duty to attend a one-year specialized training course. Upon completion of his active duty training, Mr. Elder was restored to his former position, but without the increase in his hourly wage to which he would have been entitled had he remained continuously employed during the period of his active duty service. Mr. Elder later voluntarily terminated his employment and now seeks approximately $300 in back pay. No suit has been filed because the parties are attempting to settle the matter without litigation.

5. Glenn F. Johnson v. Colt Industries, Inc., No. 89-0063-BG(M) (W.D. Ky.). Mr. Johnson was employed by Colt Industries for more than four years as a carburetor assembler prior to enlisting in the Army. Following a four-year period of active duty, the employer rehired Mr. Johnson, but failed initially to restore him to his former position and later laid him off during a reduction in force without crediting his period of military service for the purpose of determining his seniority and eligibility for retention. The suit seeks back pay. The employer has made a settlement offer which is presently under consideration by Mr. Johnson.

6. Kenny E. Jones v. City of Clinton, Missouri, No. 89-1054-CV-W-1 (W.D. Mo.). Mr. Jones, an Army reservist, was employed by the City of Clinton, Missouri, as a firefighter. The City denied his request for leave to attend a three-day specialized training program. Notwithstanding the denial, Mr. Jones attended the training and, upon his return, was reprimanded, suspended for ten days, and demoted. He later voluntarily terminated his employment and we filed suit on his behalf to recover back pay. The parties have reached a settlement agreement and we expect a stipulation of dismissal to be filed shortly.

7. Nevin E. Salada v. Brocious Trucking, Inc., No. 90-1322 (W.D. Pa.). Mr. Salada, a member of the Army Reserve, was employed by Brocious Trucking as a mechanic for approximately one month before reporting for his annual two-week training camp. The employer refused to reinstate Mr. Salada upon his return from active duty for training. The court has entered a scheduling order requiring that discovery be completed by June 28, 1991, but no trial date has been set. The parties are discussing settlement.

8. Monica Ann Wood v. Community Systems & Services, Inc., (E.D. Va.). Ms. Wood was employed by Community Systems & Services, Inc., as director of mental health for approximately two years prior to enlisting in the Virginia Army National Guard and being ordered to initial active duty for training ("IADT"). The employer terminated Ms. Wood while she was on IADT status and refused to reemploy her following completion of IADT. Ms. Wood later obtained other employment and does not seek reinstatement. Although Ms. Wood initially requested that the Department of Justice represent her in an effort to recover approximately $15,000 in lost wages, after the case was assigned to the United States Attorney she requested that we suspend further action until she decided whether to pursue litigation of her claim.

9. Bruce Zurawski v. Soo Line RR Co., No. 4-90-331 (D. Minn.). Mr. Zurawski was employed by Soo Line RR Company as an apprentice carman prior to enlisting in the Navy. Upon completion of four years of active duty service, the employer reinstated Mr. Zurawski, but later temporarily furloughed him without crediting his military service for purposes of determining his seniority and eligibility for retention. Discovery has been completed and a pretrial conference is to be held April 16, 1991. No trial date has been set. We have submitted a settlement offer to the employer which is under consideration.

3. Under current law, what, if any, death benefits and survivor benefits are required to be provided relative to employees who die while on active duty? Is this issue addressed in the Administration bill?

Response: Assuming that the question is directed to death and survivor benefits provided by the Federal Government upon the death of a service member, such benefits are set forth in Chapters 11-24 of Title 38, United States Code. The Department of Veterans Affairs has recently published a pamphlet entitled "Federal Benefits for Veterans and Dependents" (January 1991), which summarizes the numerous benefits available. Death and survivor benefits are not specifically addressed in the Administration's bill, which is not intended to change the law in this area.

4. Under current law, do employees have the right to use accrued or compensatory leave during the period he or she is activated? Is this issue addressed in the Administration bill?

Response: We have consulted with DOL regarding this aspect of the VRR law because of its expertise in the area and our response is based largely upon the information DOL provided. The current VRR statute does not grant employees who are reservists or guardsmen the right to use accrued or compensatory leave for periods of military service or training, and employers may not

require employees to use such leave for military service. The current statute requires employers to grant reservists and guardsmen an unpaid leave of absence for specified types of military service. 38 U.S.C. § 2024(d), (f). This leave is in addition to any other leave available to the individual under the terms of his employment. We understand that, in practice, many employees request, and many employers grant, annual leave for all or part of periods of military service or training so that employees may maximize earnings during such periods.

We note that federal employees are entitled to 15 days of paid military leave annually, 5 U.S.C. § 6323, and may use all or part of their accrued annual leave for additional periods of active duty military service.

The Administration's bill does not address this issue and is not intended to change the current law in this area.

5. Would you generally discuss the issue of retirement credit and pension rights of persons temporarily called to active duty? What are those rights under current law? Under the Administration bill?

Response: We have consulted with DOL regarding this question because of its great familiarity with this area of the law and our response is based largely upon the explanation provided by DOL. Under current law, a returning employee covered by a defined benefit pension plan (i.e., one which provides benefits based upon length of service) is entitled to credit toward his or her retirement pension for periods of military service. See Alabama Power Co. v. Davis, 431 U.S. 581 (1977). However, treatment of employees covered by defined contribution pension plans (i.e., those which provide benefits based solely upon contributions) is unsettled under current law.

Under the Administration's bill, periods of military service would be credited for pension vesting purposes under both defined benefit and defined contribution plans. Benefits would also accrue under defined benefit plans based upon the period of service, but employers would not be required to contribute to defined contribution plans for periods of military service. Periods of military service by employees covered by a multi-employer pension plan (i.e., a defined benefit plan covering employees of two or more unaffiliated employers such as union-negotiated plans in the construction trades and trucking industry) would be credited for accrual and vesting purposes upon reemployment with any employer contributing to the plan. Where benefits are conditioned upon employee contributions, no benefits would accrue until the returning veteran makes the necessary contributions for the period of military service.

6. Please elaborate on the presumption of reasonableness found in the Administration's proposed bill sec. 2022(e), and why is it necessary or desirable. Also, what statutes now employ a similar presumption of reasonableness?

Response: Section 2022(e) of the Administration's bill provides that:

> In determining a person's entitlement to rights and benefits under this chapter, the timing, frequency, and duration of any person's training or service or the nature of training or service in the uniformed services shall be presumed to be reasonable and protected so long as the service does not exceed the limitations set forth in section 2025(b) of this chapter, and training or service which the person volunteered for shall be entitled to the same protection as training or service imposed upon the person as a legal obligation.

The presumption of reasonableness set forth in section 2022(e) is an important provision designed to protect service members. As stated in our earlier comments, employers in some cases have objected to extended absences for reservists and guard members. Courts have imposed a "reasonableness" test to determine whether a particular leave of absence is allowable. See, e.g., King v. St. Vincent's Hospital, 901 F.2d 1068 (11th Cir. 1990), cert. granted, 59 U.S.L.W. 3545 (U.S. Feb. 19, 1991); Gulf States Paper Corp. v. Ingram, 811 F.2d 1464 (11th Cir. 1987); Lee v. City of Pensacola, 634 F.2d 886 (5th Cir. 1981). But see Kolkhorst v. Tilghman, 897 F.2d 1282 (4th Cir. 1990).

We are arguing before the Supreme Court in the King case that the judicially-created reasonableness rule is improper under the existing VRR statute. Section 2022(e)'s presumption of reasonableness, if included in the new VRR legislation, would largely obviate the current problem. It would create a strong, but rebuttable presumption for both employers and the courts that the timing, frequency, and duration of service set forth in military orders is reasonable, unless unusual facts warranted setting aside the presumption. Absent such a presumption, employers could continue to deny service members reemployment rights and attempt to subpoena military officials and documents to show that a particular service member's leave of absence is unreasonable or unnecessary. Adoption of the presumption will likely eliminate many employer challenges to the reasonableness or necessity of military service and training, and will thus reduce litigation in this area.

There are numerous provisions in Title 38, United States Code, which establish factual presumptions in favor of service members and their dependents. See, e.g., 38 U.S.C. § 108

(presumption of death after seven-year absence); 38 U.S.C. § 311 (presumption of sound condition upon entry into service); 38 U.S.C. § 312 (presumption that certain diseases and disabilities were incurred or aggravated by period of service); 38 U.S.C. § 507 (presumption that status of veteran receiving pension remains unchanged despite his disappearance).

7. You state on the first page of your testimony that any modifications of veterans benefits and protections must fit within the overall parameters of the budget agreement. Is the Administration willing to reorder any of its spending priorities to accommodate modification of veterans benefits and protections?

Response: The Administration has worked closely with the House and Senate on the provisions contained in S. 725, the "Persian Gulf Conflict Supplemental Authorization and Personnel Benefits Act of 1991." That bill has passed the House and Senate and has been signed into law by the President. S. 725 would, among other provisions, increase veterans' education, health, life insurance, and housing benefits.

The Administration has also worked closely with the House and Senate on H.R. 1281, the Dire Emergency Supplemental Appropriations bill. That bill has passed the House and Senate and is awaiting Presidential action. H.R. 1281 includes the appropriation of $250 million for veterans' readjustment benefits. H.R. 1281 also includes $25 million for medical care for veterans. At the Administration's request, H.R. 1281 includes $12 million for 132 additional staff for the Department of Veterans Affairs to process claims submitted by veterans of Operation Desert Storm.

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DATE RECEIVED: 12 Mar

TRANSCRIPT (Orig)
7 Mar
HVAC SCte on ET&E
Subj: Legislative Hearing on a Discussion Draft to Amend Chapter 43, Title 38, U.S.C. (Veterans Reemployment Rights)
Wit: Hon. S. Duncan, ASD(RA), accomp by F. Rush, AASD(M&P)
Time: 0930 - 1120
Pgs: 1 0 85

RA IS OPR for this transcript - include all inserts required - clear thru OSD(SecRev) - 2C757 - BEFORE returning to OSD(LA) - [redacted] 3D932 - Alice Caton

CTE SUS: 21 Mar

DATE	TO	FOR*	DESCRIPTION (Copy No., Incl)	SIGNATURE
14 Mar	RA	A	Orig trans, as abv	B Bishop
21 Mar	HVA SCte on ET&E ~~335 CHOB~~ ATTN: Beth	T	Edited trans, as abv, w/ ~~IPR-11~~	X E. Kilker
10 Apr	HVAC SCte on ET&E ~~335 CHOB~~ ATTN: Beth	T	2 cys ea of Penny Qs- ~~1 & 2~~	X E. Kilker

*CODE: A - Action; C - Coordination; CF - Central Files; CR - Cross Reference; D - Disposition; DC - Destruction, Certificate of; F - Office File; I - Information; R - Routing; T - Transfer; Z - Other (Specify)

SD FORM 1 MAR 67 431

1. Mr. Secretary, in your statement you discuss the confusion which currently exists with regard to the length of military training that is protected. The Administration proposal would clarify this issue by including in the statute language saying, "...the timing, frequency, and duration of any person's training or service or the nature of training or service...shall be presumed to be reasonable and protected..."

In the discussion draft, we addressed this issue by establishing the 90-day yearly absense ceiling with several appropriate exceptions. We believe that with this structure we would eliminate the nagging "reasonableness" problem and address head-on the concern about individuals who abuse their status in the Selected Reserve. I have two questions for you related to these matters.

a. Does not the Administration proposal set up a rebuttable presumption with the language I just quoted? Wouldn't litigation, in fact, increase as result of that language and would it not undermine the government's position in the case now before the Supreme Court (King vs. St. Vincent's Hospital)?

b. One occasionally reads or hears about extreme cases of abuse or their protected reemployment rights by Selected Reservists. How widespread is that abuse? What efforts are now made to ensure that abuse does not occur?

1a. The Administration proposal would provide that the timing, frequency, and duration of any person's training or service or the nature of the training or service shall be presumed to be reasonable and protected. As the analysis of section 2022(e) of the Administration proposal indicates, the reasonableness presumption is rebuttable, but the sole focus of the reasonableness inquiry would be the conduct of the employee. This construction, in my view, is consistent with the government's position as articulated in the pending Supreme Court case. As you know, the Government's view is that there is no requirement under the current Veterans' Reemployment Rights Act that a leave request be reasonable. Under the Administration proposal it should be very clear that courts would not be obliged or expected to balance the competing demands of the military for training or service against the needs of an employer. I do not believe, therefore, that litigation would increase. To the contrary, a clear statutory presumption of reasonableness should serve to limit litigation to those cases where specific intent to harm an employer could be established.

1b. I believe that the abuse of reemployment rights by Reservists is relatively infrequent. However from a public policy perspective we must be concerned with the potential for abuse. As I indicated in my prepared statement, enthusiastic voluntary cooperation and support from employers is critical to successful Reserve programs. Statutory protections and enforcement mechnisms form a necessary foundation for this cooperation, but they are not sufficient. Therefore, it is important that commanders accommodate Reserve training schedules with the needs of civilian employers where possible. My office has stressed to the Military Departments the need to remain sensitive to the impacts on employers which the demands of Reserve training may engender. While I do not consider abuse to be a significant problem, I do believe that we need to examine the merits of a more formal policy in this area within the Department of Defense.

2. The National Committee for Employer Support of the Guard and Reserve does play an important role in VRR issues, particularly on the local level.

How are these individuals trained to ensure they fully understand the VRR law?

What is the relationship between Department of Labor staff and the National Committee staff at the grass-roots level? Are their roles and responsibilities clearly defined?

The National Committee for Employer Support of the Guard and Reserve (NCESGR) has over 3,700 volunteer members in 55 state/territorial committees who work with U.S. employers, employees, and communities to ensure understanding and appreciation of the role of the National Guard and Reserve in the Total Force Policy and to encourage and assist employee participation in Guard and Reserve programs without job impediment. Of those 3,700 members, approximately 200 are state ombudsmen who assist in resolving employer/employee problems and misunderstandings that may result from Guard or Reserve obligations.

NCESGR's full-time staff conducts several Ombudsman Workshops each year that provide 10-25 new or previously untrained state committee volunteers with 12 hours of formal instruction on the VRR statute and procedures for informal mediation of real and perceived Reserve duty/civilian job problems. Additionally, representatives from the U.S. Department of Labor, Veterans' Employment and Training Service (DoL/VETS), U.S. Office of Personnel Management (OPM), U.S. Postal Service, and the U.S. Merit Systems Protection Board (MSPB) frequently participate in the training to instruct on suggested documentation, interagency coordination, and problem resolution. Workshop attendees are provided a binder containing the information presented in the workshop, as well as many documents that address specific protections, agency guidance, procedures, and points of contact. NCESGR also conducts a number of regional conferences that have included an in-depth course on the VRR statute for ombudsmen and other interested volunteers.

During January and February 1991, NCESGR staff provided mobilization unique training at five special regional workshops which focused primarily on special DESERT SHIELD/STORM VRR issues. Ombudsmen from 38 states received timely instruction at these events. Representatives from DoL/VETS, OPM, and MSPB participated in each of the sessions.

State ombudsmen are also kept abreast of nationwide problems and trends through NCESGR's ESGRam, a monthly eight page information newsletter. Additionally, NCESGR provides state ombudsmen special instructional letters on time sensitive changes to the law, Department of Defense interpretation and/or application of Reservist obligations and protections. For example, during the evolution of Operations DESERT SHIELD and DESERT STORM, ombudsmen were sent letters in August, October, and December 1990, and again in January and March 1991. Finally, NCESGR Ombudsmen provide a toll-free telephone hotline and frequently assist state ombudsmen calling for information, assistance, or clarification.

DoL/VETS renders formal reemployment aid to Reservists, Guardsmen and veterans. NCESGR's ombudsman mission is to provide informal reemployment assistance to Guardsmen, Reservists and their employers in situations that may have an adverse impact on military participation and retention.

Volunteer ombudsmen at the Employer Support of the Guard and Reserve state committee level are encouraged to establish and maintain communication with DoL/VETS representatives within their state. The ombudsmen work VRR inquiries on an informal basis, attempting to promptly resolve Reserve duty problems. NCESGR policy requires unresolved problems involving loss of employment or refused reemployment to be referred to DoL/VETS or the OPM within 3 days. Other reemployment rights problems are referred to the appropriate federal agency no later than 10 days after the initial contact. Many ombudsmen work closely with their DoL/VETS counterparts even during the informal 3/10 day period. Coordination, communication, roles and responsibilities are stressed in the NCESGR Operations Manual, formal training, letters to the volunteers, and intermittently in ESGRam articles.

April 4, 1991

Honorable Timothy J. Penny, Chairman
Subcommittee on Education, Training
and Employment
U.S. House of Representatives
335 Cannon House Office Building
Washington, DC 20515

Dear Chairman Penny:

I received a letter from G.V. "Sonny" Montgomery, Chairman of the House Veterans Affairs Committee submitting your additional questions regarding the March 7, 1991 hearing on Veterans' Reemployment Rights. I am happy to respond to the questions in the order in which they were presented.

1. Have you had an opportunity to review the Administration bill? If you have, what provisions of that bill do you believe should be incorporated into the bill that will be introduced by this Subcommittee? If you haven't yet seen the Administration bill, please provide your views for the hearing record after you've reviewed that measure.

Answer: I have had an opportunity to review the Administration bill and as a result offer the following comments and observations. We support most of what the Administration is offering. We are pleased to see they are requesting codification of judicial interpretation. As it currently stands, those seeking to determine what the reemployment rights statute means must review both Chapter 43 of Title 38 and a significant body of case law. This codification will eliminate the need to cross-reference the code and judicial interpretations.

The Administration proposes to include in Section 2023 a clarification that the "obligations of the employer also apply to the employer's 'successor in interest.'" Your draft bill which was the subject of the March 7 hearing also had that provision. As indicated in our testimony, we support that provision.

We support the Administration's proposal to include in Section 2023, as part of the definition of "agency in the executive branch," nonappropriated fund instrumentalities of the United States.

In our prepared testimony of March 7, we expressed concern over the meaning of "temporary position." This concern seems to be satisfied by the Administration's proposal to codify the definition used by the United States Court of Appeals for the Sixth Circuit (Stevens v. Tennessee Valley Authority, 687 F.2d 158, 161-62 [Sixth Cir. 1982]). While we have not reviewed that Court decision, it appears the example I cited in my testimony, i.e., Tennessee Valley Authority and its use of temporary appointments, may be addressed in that Circuit Court finding. We have requested a copy of the Court's finding and upon our review will comment further, if appropriate.

The Administration's proposal deletes the provision in Section 2024 of current law that extends the maximum period of military service from four to five years if the period beyond four years is an extension "at the request and for the convenience of the federal government." They suggest extending the period of active duty to five years. While we do not oppose the extension to five years, we are concerned that there may be limited, but yet valid, situations where an individual may be

extended "at the request and for the convenience of the federal government." While this may be a rarity, we believe that phrase should be retained in future law to cover such circumstances.

Your draft bill and the Administration's proposal both provide that an individual returning from military service "may not displace an employee with a superior claim under the Veterans' Preference Act." We believe this provision is ambiguous and needs clarification either in Committee report language or the statute itself. For example, if while a person is called to active duty in the reserves, a disabled veteran is temporarily assigned to fill that position, does that preference eligible have a "superior claim?"

On pages 20, 21, 22 and 23 of the Administration's sectional analysis, they discuss in fairly lengthy detail the enforcement/appellate process. We have a major concern with the enforcement/representation proposed for federal employees exercising reemployment rights.

The Administration proposes that such aggrieved veterans be represented by the Office of Special Counsel (OSC) before the Merit Systems Protection Board (MSPB). In the event MSPB does not find favorably for the veteran, the veteran may appeal through the courts but must obtain representation by private counsel at his or her own expense.

On the other hand, a veteran, claiming reemployment rights with state or local governments or private employers, will be represented by either the Attorney General or the Solicitor of Labor up to and including the United States Supreme Court, if appropriate.

The denial of similar representation to veterans attempting to exercise reemployment rights with a federal government agency results in an unequal remedy and disparate treatment to those individuals. To do so also denies "equal benefits for equal service." We believe it is patently unfair to provide a level of representation at no cost that might include representation before the United States Supreme Court to one class of veterans, i.e., employees of private sector or state or local government employers while, on the other hand, providing free representation through only one quasi-judicial process to another class of veterans.

This logic runs contrary to phrases contained in both the Administration's sectional analysis and their draft bill such as:

> "... makes it clear that the reemployment obligation applies to the Federal Government just as it applies to any other civilian employer." (While the obligation may be the same, the remedy is different.)
>
> "Section 2029(b) and (c) are new provisions intended to provide assistance and legal representation to Federal employees and former Federal employees who claim reemployment rights. The intent is to provide Federal employees and former Federal employees the same kind of assistance in securing their reemployment rights as is provided to persons claiming reemployment rights within state or local governments or private employers." (The Administration's proposal does not provide the "same kind of assistance" as has been pointed out earlier.) (Emphasis added.)

"The OSC shall provide representation before the MSPB but not before the Federal Circuit Court of Appeals or the Supreme Court, on appeal from the MSPB." (This is exactly where assistance and representation differ. For those seeking relief against a private employer or state or local government, representation is provided up to and including before the United States Supreme Court.) (Emphasis added.)

"The Federal Government should be a model employer with respect to the policies of this Act. In order to make that intent a reality, ..." (that intent will never be a reality if legislation is enacted that claims to provide equal benefits but yet does not provide equal enforcement/ representation).

"The new Chapter [Chapter 92, Title 5, U.S. Code] is intended to provide an efficacious and expeditious enforcement mechanism for Chapter 43 of Title 38 with respect to the Federal Government as an employer." (Obviously, as has been previously pointed out, this statement is far from the truth when former federal employees will not be afforded the same rights of representation as those in the private sector. This proposal does not have the capability of producing the desired effect or having the intended result, unless in those cases where aggrieved, former federal employees can afford to hire their own attorney. We do not believe this is what Congress wants to do.)

Former employees of the legislative or judicial branch receive even less. Their only right is to "apply to their pre-service employers for reemployment rights. If those legislative branch or judicial branch employers find it infeasible to reemploy such returning veterans, OPM should identify for them positions in the executive branch." These individuals have no rights of appeal to MSPB and are not provided any representation or assistance by the federal government.

The Administration's proposal suggests an amendment to the term "eligible person" contained in Section 2001(5), Title 38, U.S. Code. That amendment allows members of a reserve component to be considered "eligible persons" for employment services. The Disabled American Veterans is totally opposed to that amendment as it would give veteran status to all members of a reserve component regardless of their active duty.

Rather, we recommend an amendment to Section 2001(4) and 2011(4) of Title 38 to amend the term "eligible veteran." We suggest Section 2011(4) be amended as follows: strike the word "or" as it appears before (B), strike the period at the end of clause (B) and insert in lieu thereof, "or" and add at the end thereof the following new clause: "(C) meets the definition contained in Section 3103A (b)(1) of this Title."

This amendment allows for reservists who are called to active duty, do not serve a period of more than 180 days, but do fulfill their commitment, to be eligible. An alternative would be to provide veteran status to only those reservists and National Guardsmen who are eligible to receive a campaign badge or medal. The aforementioned 3103A definition is used by the Office of Personnel Management in determining eligibility for veterans' preference (see attached letter).

2. In your view, what are the most pressing issues that must be addressed in a Chapter 43 rewrite?

Answer: The question of equal and adequate representation to former federal employees as discussed in the answer to Question No. 1. We are also concerned about the use of the term "temporary position" but believe the Administration's suggestions satisfy our concern.

3. We still don't have a good handle on what assistance should be provided federal employee who pursue a VRR case beyond the MSPB. What are your views on this?

Answer: The answer to Question No. 1 discusses in great detail our views on benefits to be provided federal employees. Unless federal employees are provided the same type of representation, we will have unequal benefits for equal service. We suggest if the federal government is not going to provide representation beyond MSPB, the aggrieved, former federal employee should be able to retain counsel of his or her choosing and the executive branch pay for that representation. I also wonder if the Office of Special Counsel has the authority to represent veterans before MSPB without amending Section 1206 of Title 5, U.S. Code, to include failure of an agency to reemploy an individual as a "prohibited personnel practice."

4. Ron, I'm interested in your comments regarding an extended retraining time for severely disabled veterans. What exactly would be the relationship between the veteran, VA, DOL, and the employer?

Answer: In the case of the most severely disabled veterans, we suggest a reasonable time be established in which the veteran must notify the employer that he or she is interested in returning to work at some time in the future. This would put the employer on notice that upon completion of hospitalization, convalescence and/or retraining, the employer will have to provide the original job or a comparable one.

The Department of Labor would continue to be responsible for the investigatory/enforcement function. In that respect, the Department of Labor would also assume responsibility to assure the veteran notifies the employer in a timely fashion. An alternative could be established by developing a Memorandum of Understanding (MOU) between the VA and DOL as to who would assume the responsibility of assisting the veteran in notifying the employer.

The Vocational Rehabilitation Specialist (VRS) or Counseling Psychologist (CP) with the VA's Department of Vocational Rehabilitation should be assigned the responsibility of case manager. The VRS or CP working at the medical center should be an intricate component of the rehabilitation plan. At the earliest possible date, the VA and a representative of the employer should meet with the veteran to determine:

(1) Is the job still available?

(2) Can the veteran return to his or her previous job with or without job modifications or accommodations?

(3) Will the veteran need any retraining or special equipment to facilitate returning to the old job?

(4) If it is otherwise medically unfeasible or if another job of comparable status is offered, a determination needs to be made as to what any accommodations, equipment or training will be needed.

(5) As soon as those questions are answered, the vocational rehabilitation staff should develop a comprehensive Individual Employment Assistance Plan (IEAP) and initiate any necessary retraining at the earliest possible date.

During these discussions, a determination should be made, as reasonably practical, as to when the veteran may return to work. We believe that by making the employer an integral part of the rehabilitation plan and process, the adverse impact on the employer can be minimized. We believe this is necessary to assure those veterans who receive the most severe disabilities while serving on active duty can return to a fruitful, productive career.

In the event the disabled veteran decides he or she does not wish to return to the former employer, the employer should be so notified at a reasonable time and the Disabled Veterans' Outreach Specialist should be made part of the overall planning process and development of an Individual Employment Assistance Plan.

I am happy to provide these responses to you and if you have any other questions, I would be happy to discuss them with you or members of your staff.

Sincerely,

Ronald W. Drach

RONALD W. DRACH
National Employment Director

RWD:dlw
Attachment

Questions
Military Association Panel
7 March 1991

Responses to Questions from Congressmen
Penny to Colonel Schreiber

1. Is it your sense that the Department of Labor and the Department of Justice are staffed adequately to handle the increase in VRR cases that can be anticipated in the future?

The National Guard Association of the United States does not get involved in individual veterans reemployment rights cases. We have no experience factor for the current size of the Department of Labor or Department of Justice staffs and their cases loads. Therefore, we cannot effectively comment on their adequacy for the future.

2. What VRR-related problems do you most often hear about from your members?

Again, NGAUS has not been involved in VRR claims or cases. When your members contact us concerning employer issues, we refer them to the National Committee on Employer Support of the Guard and Reserve. Typically, the calls involve requests for information on rights. The calls we receive appear to be problems for ombudsman intervention rather than legal action.

DEMOCRATS
G.V. (SONNY) MONTGOMERY, MISSISSIPPI
BOB EDWARDS, CALIFORNIA
DOUGLAS APPLEGATE, OHIO
LANE EVANS, ILLINOIS
TIMOTHY J. PENNY, MINNESOTA
HARLEY O. STAGGERS, JR., WEST VIRGINIA
J. ROY ROWLAND, GEORGIA
JIM SLATTERY, KANSAS
CLAUDE HARRIS, ALABAMA
JOSEPH P. KENNEDY II, MASSACHUSETTS
ELIZABETH J. PATTERSON, SOUTH CAROLINA
GEORGE E. SANGMEISTER, ILLINOIS
BEN JONES, GEORGIA
JILL L. LONG, INDIANA
DOUGLAS "PETE" PETERSON, FLORIDA
CHET EDWARDS, TEXAS
MAXINE WATERS, CALIFORNIA
BILL K. BREWSTER, OKLAHOMA
OWEN B. PICKETT, VIRGINIA
PETE GEREN, TEXAS

MACK FLEMING
STAFF DIRECTOR AND CHIEF COUNSEL

ONE HUNDRED SECOND CONGRESS

G.V. (SONNY) MONTGOMERY
CHAIRMAN

U.S. House of Representatives
COMMITTEE ON VETERANS' AFFAIRS
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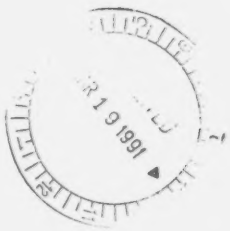
March 8, 1991



MG Evan L. Hultman, AUS (Ret.)
Executive Director
Reserve Officers Association
One Constitution Avenue, NE
Washington, DC 20002

Dear General Hultman:

In reference to our Subcommittee on Education, Training and Employment hearing on March 7, 1991, I would appreciate it if you would answer the additional questions submitted by the Honorable Timothy J. Penny, by March 29, 1991.

In an effort to reduce the printing costs, the Committee on Veterans Affairs, in cooperation with the Joint Committee on Printing, is implementing some formatting changes for materials for all full committee and subcommittee hearings. Therefore, it would be appreciated if you could provide your answers consecutively on legal size paper, single spaced. In addition, please restate the question in its entirety before the answers.

Sincerely,

G. V. (SONNY) MONTGOMERY
Chairman

GVM:ek

Reference Subcommittee on Education, Training and Employment hearing on 7 March 1991, regarding Veterans Reemployment Rights. The following answers to questions are submitted for the record by Maj. Gen. Evan L Hultman, AUS (Ret.), Executive Director, Reserve Officers Association of the United States:

1. Is it your sense that the Department of Labor and the Department of Justice are staffed adequately to handle the increase in VRR cases that can be anticipated in the future?

It is ROA's sense that the Departments of Labor and Justice are not adequately staffed to handle any increase in VRR cases. The problem could be particularly acute following the return of Reservists from active duty in DESERT STORM. The problem in the Department of Justice, and perhaps to a lesser extent in the Department of Labor, may also be one of priority. Adding staff members does not always insure that the workload will be accomplished. In the Department of Justice, narcotics and criminal cases can expect to be given a higher priority than cases involving reemployment rights, and the resources are used accordingly.

2. What VRR-related problems do you most often hear about from your members?

ROA cannot identify any one problem or problems that reoccur more frequently than others. More often than not, Reservists contact the association seeking information on Veterans' Reemployment Rights. Because of the outstanding record of the National Committee for Employer Support for the Guard and Reserve and our own limited staff, ROA refers nearly all of those seeking information and assistance to the Committee.

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